

88-97.

Supreme Court, U.S.

FILED

JUL 14 1988

JOSEPH F. SPANIOLO, JR.

CLERK

No.

In the Supreme Court
OF THE
United States

October Term, 1988

FORD MOTOR COMPANY
Petitioner,

VS.

GARY BRYANT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD J. PRIVETT
Counsel of Record
RICHARD A. GOETTE
RALPH ZAREFSKY
MCCUTCHEN, BLACK, VERLEGER &
SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017
(213) 624-2400
Counsel for Petitioner

QUESTIONS PRESENTED

1. Can a state pleading practice permitting a plaintiff to name allegedly unknown defendants charged with no actionable conduct foreclose the right of removal based on diversity of citizenship under federal law?

2. In state cases that include fictitious Doe defendants, does the 30 days within which a case must be removed, 28 U.S.C. § 1466(b), commence only after the plaintiff drops the Does or the trial commences without service of the Does even though the statute provides, that removability may appear through "receipt of an amended pleading, motion, order or other paper?" *Id.*

3. Where a state case that includes unserved fictitious Doe defendants is removed without challenge, and the District Court disregards the Does (no formal order of dismissal) in rendering judgment for the named defendant, must the judgment be vacated and the case remanded to state court?

PARTIES

The parties to this action are Gary Bryant, an individual, and Ford Motor Company ("Ford"), a corporation, the parties listed in the caption. Ford alone files the within petition. Ford's corporate subsidiaries and affiliates are listed in Appendix C.

The Complaint also listed as defendants "Does 1-50," but did not describe or otherwise identify them, or charge them with any actionable conduct. Following judgment plaintiff asserted that three other corporations, City Ford Company, General Seating and Sash Company, and Grumman-Olson Company also should be parties. Ford, the petitioner here, is unaware of the existence of any corporate subsidiaries or affiliates of those entities.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED.....	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT	4

I.

Removal Jurisdiction Must Be Determined By Reference To Federal, Not State Law	4
--	---

II.

The Ninth Circuit's "Bright Line Rule" For Determining Removal Jurisdiction In Cases Containing Fictitious Doe Defendants Conflicts With the Removal Statutes And The Decisions Of This Court	8
A. The Rule Conflicts With Decisions Disregarding Formal Or Unnecessary Parties, Or Fraudulently Or Wrongly-Joined Defendants	9
B. The Rule Conflicts With Statutory And Decisional Law Requiring Removal At The Earliest Possible Time	12
C. The Rule Conflicts With Statutory And Decisional Law Establishing A Different Standard For Appellate Review Of A Judgment Than For District Court Decision On A Motion To Remand	15

III.

The Removal Statutes Do Not Allow Remand For The Purpose Of Administrative Ease.....	17
CONCLUSION.....	18

INDEX TO APPENDICES

APPENDIX A. Amended Opinion of the Ninth Cir- cuit Court of Appeals	A-1
APPENDIX B. District Court's Summary Judg- ment	B-1
APPENDIX C. List of Petitioner's Subsidiaries ..	C-1
APPENDIX D. Pertinent Statutes Involved	D-1

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<i>Alabama Great Southern Ry. Co. v. Thompson</i> , 200 U.S. 206 (1906)	9
<i>Barnes v. Wilson</i> , 40 Cal.App.3d 199, 114 Cal.Rptr. 839 (1974)	4, 5
<i>Barney v. Latham</i> , 103 U.S. 206 (1881)	13
<i>Barngrover v. M. V. Tunisian Reefer</i> , 535 F.Supp. 1309 (C.D. Cal. 1982)	14
<i>Burlington Northern R. Co. v. Woods</i> , 107 S.Ct. 967 (1987)	7
<i>Camden Industries Co. v. Carpenter Local Union, etc.</i> , 246 F.Supp. 252 (D. N.H.), <i>aff'd</i> 353 F.2d 178 (1st Cir. 1965)	14
<i>Chesapeake & Ohio R.R. Co. v. Cockrell</i> , 232 U.S. 146 (1914)	9
<i>Chicago, Rock Island and Pacific Railway Co. v. Schwyhart</i> , 227 U.S. 184 (1913)	9
<i>Chism v. National Heritage Life Insurance Co.</i> , 637 F.2d 1328 (9th Cir. 1981)	5
<i>City of Minneapolis v. Reum</i> , 56 Fed. 576 (8th Cir. 1893)	7
<i>Doe v. Bolton</i> , 410 U.S. 179 (1973)	5
<i>Fisher v. United Airlines, Inc.</i> , 218 F.Supp. 223 (S.D.N.Y. 1963)	14
<i>Gamble v. General Foods Corporation</i> , 846 F.2d 51 (9th Cir. 1988)	5, 16
<i>Grigg v. Southern Pacific Co.</i> , 243 F.2d 613 (9th Cir. 1957)	5, 6
<i>Grubbs v. General Electric Credit Corporation</i> , 405 U.S. 699 (1972)	8, 15, 16

TABLE OF AUTHORITIES
CASES

	<u>Page</u>
<i>Hise v. Garlock</i> , 841 F.2d 342 (9th Cir. 1988)	5
<i>Lee v. Altamil Corp.</i> , 457 F.Supp. 979 (M.D. Fla. 1978)	14
<i>Mas v. Perry</i> , 489 F.2d 1396 (5th Cir. 1974)	7
<i>Miller v. Stauffer Chemical Co.</i> , 527 F.Supp. 775 (D. Kan. 1981)	14
<i>Powers v. Chesapeake & Ohio Railway</i> , 169 U.S. 92 (1898)	13
<i>Munoz v. Purdy</i> , 91 Cal.App.3d 942, 154 Cal.Rptr. 472 (1979)	5
<i>Pullman Co. v. Jenkins</i> , 305 U.S. 534 (1939)	8, 9
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	5
<i>Salem Trust Co. v. Manufacturers' Finance Co.</i> , 264 U.S. 182 (1924)	8, 9
<i>Shamrock Oil Corp. v. Sheets</i> , 313 U.S. 100 (1941)	8
<i>Stewart Organization, Inc. v. Ricoh Corporation</i> , 56 U.S.L.W. 4659 (June 21, 1988)	6, 7
<i>Stifel v. Hopkins</i> , 477 F.2d 1116 (6th Cir. 1973)	7
<i>Strawbridge v. Curtiss</i> , 7 U.S. (3 Cranch) 267 (1807)	12
<i>Thermtrom Products, Inc. v. Hermansdorfer</i> , 423 U.S. 336 (1976)	17
<i>United Steelworkers v. R. H. Bouligny, Inc.</i> , 382 U.S. 145 (1965)	17
<i>Wecker v. National Enameling and Stamping Co.</i> , 204 U.S. 176 (1907)	9

TABLE OF AUTHORITIES
CASES

	<u>Page</u>
<i>Wilson v. Republic Iron & Steel Co.</i> , 257 U.S. 92 (1921)	9, 10, 11, 16
<i>Ziady v. Curley</i> , 396 F.2d 873 (4th Cir. 1968)	7

Miscellaneous

Advisory Committee Notes to 1966 Amendment to Fed. R. Civ. P. 17	11
10C California Forms of Pleadings and Practice, p. 83 (1988)	10
3 Congressional Record 4302 (1874)	13
H.R. 9622, 95th Cong. (1978)	17
H.R. 2202, 96th Cong. (1979)	17
H.R. 6816, 97th Cong. (1982)	17
H.R. 3152, 100th Cong. (1987)	17
Judicial Council of California, <i>1988 Annual Report</i> , p. 103	14

Rules

Federal Rules of Civil Procedure, Rule 11	11
Federal Rules of Civil Procedure, Rule 17	11
Federal Rules of Civil Procedure, Rule 17(a)	11
Federal Rules of Civil Procedure, Rule 60(b)	3, 16
Rules of Ninth Circuit Court of Appeals, Rule 35-3	2

Statutes

California Code of Civil Procedure, Sec. 474 (West, 1983)	2, 4
California Code of Civil Procedure, Sec. 583.210 (West Supp. 1988) (formerly (581a(a)))	13
United States Code, Title 28, Sec. 1254(1)	2

TABLE OF AUTHORITIES

STATUTES

	<u>Page</u>
United States Code, Title 28, Sec. 1332.....	2, 7
United States Code, Title 28, Sec. 1404(a).....	6
United States Code, Title 28, Sec. 1441.....	2, 7
United States Code, Title 28, Sec. 1441(b).....	9
United States Code, Title 28, Sec. 1446.....	2
United States Code, Title 28, Sec. 1446(b) ..	8, 12, 13, 14
United States Code, Title 28, Sec. 1447.....	2
United States Code, Title 28, Sec. 1447(c)	8, 15, 16
United States Code, Title 28, Sec. 1447(d)	6
United States Code, Title 28, Sec. 2101.....	2

Textbooks

Note, <i>Doe Defendants and Other State Relation Back Doctrines in Federal Diversity Cases</i> , 35 STAN. L. REV. 297 (1983)	5, 6
R. Weil & I. Brown, California Practice Guide: Civil Procedure Before Trial, Sec. 6:58.1 at 6-10 (1988)	10
West's California Code Forms, Civil Procedure, Sec. 474 at p. 475 (1981)	10

No.

In the Supreme Court

OF THE

United States

October Term, 1988

FORD MOTOR COMPANY

Petitioner,

VS.

GARY BRYANT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Ford Motor Company ("Ford") respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Amended Opinion of the Ninth Circuit vacating the judgment of the District Court is reported in 844 F.2d 602 (9th Cir. 1988), a copy of which appears as Appendix A. The District Court's Summary Judgment was unreported, and appears as Appendix B; no findings or conclusions were entered.

JURISDICTION

Ford based jurisdiction in the District Court on 28 U.S.C. § 1441, asserting that the action, originally brought in state court, could have been brought in federal court pursuant to 28 U.S.C. § 1332, and was timely removed. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1), since this is an action in which a Court of Appeals has rendered a final judgment. After consideration by a panel of the Ninth Circuit, and rehearing by a limited en banc panel under Ninth Circuit Rule 35-3, a timely petition for rehearing by the full court of appeals was made. The Ninth Circuit then amended its opinion and denied rehearing on April 15, 1988. This petition is filed within the 90 days allowed by 28 U.S.C. § 2101.

STATUTES INVOLVED

This case involves 28 U.S.C. §§ 1332, 1441, 1446, 1447, and CAL.CIV.PROC.CODE § 474, the pertinent portions of which are set forth in Appendix D.

STATEMENT OF THE CASE

On March 1, 1983, respondent Gary Bryant, a citizen of California, was involved in an automobile accident while driving a 15-year old van. A year later he sued Ford, not a citizen of California, in Los Angeles Superior Court, alleging breach of warranty, negligence, and strict liability. The gravamen of the Complaint was that the vehicle Bryant drove was defective in some unspecified manner. Bryant sued no other defendants by name.

Bryant did, however, also list as defendants "Does 1-50." His Complaint contained no factual allegations against any such Doe. Rather, in conclusory terms, and on "information and belief," Bryant alleged that each Doe

was "legally responsible, negligently or in some other actionable manner" for events referred to in the Complaint, and that all defendants, including all Does, were the "agents, servants, employees and/or joint venturers of their co-defendants" and were acting within the course and scope of such agency, employment or joint venture.

Within 30 days of receiving the summons and complaint, Ford filed its verified petition for removal. Ford alleged that there were no factual averments against the Does and that allegations against the Does were sham. Ford's verified contentions went unanswered by Bryant who never objected to removal or moved to remand. Consequently, the case went forward in federal court. There, discovery disclosed that Bryant actually complained of a defective seat and seat belt restraint system. When Ford demonstrated that it manufactured only the chassis, and did not manufacture or install the seat or seat belt restraint system, the District Court granted summary judgment in Ford's favor.

At the time judgment was entered, Bryant had made no motion contesting the District Court's jurisdiction or seeking amendment to add additional parties. Following entry of judgment, he did move to add three entities as defendants, City Ford Company, General Seating and Sash Company, and Grumman-Olson Company. Two of these allegedly were California corporations, which, had they been parties when the action was filed, would have destroyed diversity and prevented removal. The District Court denied Bryant's motions to add parties post-judgment, finding no excusable neglect under FED.R.CIV.P. 60(b) for the delay in bringing those entities to the court's attention.

On appeal, the Ninth Circuit ordered the District Court to remand the action to state court. In its opinion, the

Ninth Circuit overruled four prior Ninth Circuit opinions, and created a new "bright line rule" for determining when the presence of fictitious Doe defendants destroys diversity of citizenship, thereby preventing removal. Under this new "bright line rule", unless a plaintiff substitutes real persons for such Does or the Does are dismissed, a case containing such Does in the caption — no matter whether it be 1 Doe or 100 Does — can be removed *only* if the plaintiff unequivocally abandons the Does. *Bryant, supra*, 844 F.2d at 605-06. Unequivocal abandonment, the Ninth Circuit held, "occurs in only two situations: (1) where the plaintiff drops the Doe defendants from the complaint or (2) where the trial commences without service of the Doe defendants." *Id.*, 844 F.2d at 606 n.5. Finally, the Court made its new bright line rule applicable to all pending cases, *id.* at 606 n.7, requiring all courts within the Ninth Circuit to remand cases which had been removed with Does in the Complaint.

REASONS FOR GRANTING THE WRIT

I.

Removal Jurisdiction Must Be Determined By Reference To Federal, Not State Law.

In attempting to create a "bright line rule" for removal, the Ninth Circuit relied on state law when instead it was bound to follow federal law. The state law at issue is CAL.CIV.PROC.CODE § 474 (West 1983), which allows a plaintiff to use fictitious parties if he claims ignorance of their names. However, as construed by California courts, this provision applies not only to ignorance of a defendant's name, but also applies to defendants who are not real entities, and are only fictions. A Doe can be named, therefore, but not charged with any actionable conduct. *Barnes v. Wilson*, 40 Cal.App.3d 199, 205, 114 Cal.Rptr.

839, 844 (1974). Since a plaintiff is not required to exercise reasonable diligence to discover either a Doe's entity or facts giving rise to a cause of action against a Doe, *Munoz v. Purdy*, 91 Cal.App.3d 942, 154 Cal.Rptr. 472 (1979), the naming of Does only tolls the statute of limitations against a prospective, unknown defendant charged with no actionable conduct.

Accordingly, in California it is universal practice for plaintiffs in state court to name large numbers of Does (here, 50 Does) and to allege with exceedingly spare averment, as here, that although the names, capacities and actions of the Does are unknown, the plaintiff believes the Does are implicated somehow, and that all defendants were agents of the others. As used in this manner, therefore, John or Jane Doe is not an alias, as in *Roe v. Wade*, 410 U.S. 113 (1973) or *Doe v. Bolton*, 410 U.S. 179 (1973); it is instead a fiction. Prior to *Bryant*, certain Ninth Circuit decisions had branded such Does as phantoms, condemned such Doe allegations as sham, and disregarded such Does for purposes of removal based on diversity, at least where the defendant's verified petition showed them to be sham. See, e.g., *Grigg v. Southern Pacific Co.*, 246 F.2d 613 (9th Cir. 1957); *Chism v. National Heritage Life Insurance Co.*, 637 F.2d 1328 (9th Cir. 1981).

Now, however, the Ninth Circuit has directed that all pending cases containing such Does must be remanded to state court, regardless of whether judgment has been entered, 844 F.2d at 606 n.7, and has dismissed pending appeals on the basis of its newly-created rule. E.g., *Hise v. Garlock*, 841 F.2d 342 (9th Cir. 1988); *Gamble v. General Foods Corp.*, 846 F.2d 51 (9th Cir. 1988). The problem also exists in cases arising in states other than California: more than 30 states allow suit to be brought against

parties with no names. Note, *Doe Defendants and Other State Relation Back Doctrines in Federal Diversity Cases*, 35 STAN. L. REV. 297, 300-01 n.14 (1983). If the rule of the Ninth Circuit spreads, each state will be free to curtail Congressionally-approved removal jurisdiction by the expedient of authorizing suits against "phantoms," who "live not and are accused of nothing." *Grigg, supra*, 246 F.2d at 620. Moreover, the Congressional removal scheme will have been changed by *Bryant* with especially pernicious results: District Courts must remand cases; yet litigants, no matter how much their cases appear to fall within the removal statutes, will be foreclosed from contesting remand decisions by the prohibition against reviewability. 28 U.S.C. § 1447(d).

Certiorari should be granted to rule that this state practice allowing Doe pleading cannot be determinative of federal jurisdiction. As recently as June 21, 1988, this Court confirmed that the source of decision-making in such situations cannot be state law. It must be federal law. In *Stewart Organization, Inc. v. Ricoh Corporation*, 56 U.S.L.W. 4659 (June 21, 1988), the Court held that the determination of venue in a diversity action must be made according to federal law. There, the parties had included a choice of forum clause in their contract, but the District Court, confronted with a motion to transfer under 28 U.S.C. § 1404(a), applied Alabama law which refused to enforce such provisions. This Court held that instead the motion to transfer must be evaluated under federal law. Ruling that both Congress and the state of Alabama had legislated on the same issue — venue — the Court held that federal law governed:

- ' The premise of the dispute between the parties is that Alabama law may refuse to enforce forum-selection clauses providing for out-of-state venues as a matter of

state public policy. If that is so, the District Court will have either to integrate the factor of the forum-selection clause into its weighing of considerations as prescribed by Congress, or else to apply as it did in this case, Alabama's categorical policy disfavoring forum-selection clauses. Our cases make clear that, as between these two choices in a single "field of operation," *Burlington Northern R. Co. v. Woods*, 480 U.S., at —, the instructions of Congress are supreme.

Id., 56 U.S.L.W. at 4661 (footnote omitted.)

See also *Burlington Northern R. Co. v. Woods*, 107 S.Ct. 967 (1987).

The federal/state conflict in *Stewart*, which arose in the context of venue, confronted the Ninth Circuit in *Bryant* in the context of removal. Assuming timeliness, removal jurisdiction lies where original jurisdiction would have lain, 28 U.S.C. § 1441, and one of the bases for original jurisdiction is diversity of citizenship. 28 U.S.C. § 1332. Like the District Court in *Stewart*, however, the Ninth Circuit deferred to state law for its construction of a federal statute. Thus the Ninth Circuit's premise was that California's policy allowing the naming of fictitious defendants was determinative of the definition of state citizenship and therefore precluded federal diversity jurisdiction. Yet, as numerous other circuits have held, the determination of citizenship for diversity purposes is controlled by federal law. *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974); *Stifel v. Hopkins*, 477 F.2d 1116, 1120 (6th Cir. 1973); *Ziady v. Curley*, 396 F.2d 873, 874 (4th Cir. 1968); *City of Minneapolis v. Reum*, 56 Fed. 576 (8th Cir. 1893). As this Court has said in other removal contexts, "the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for

determining in what instances suits are to be removed from the state to the federal courts." *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 104 (1941).

Accordingly, this Court should grant certiorari to rule that the determination of citizenship for purposes of removal jurisdiction is governed by federal law.

II.

The Ninth Circuit's "Bright Line Rule" For Determining Removal Jurisdiction In Cases Containing Fictitious Doe Defendants Conflicts With The Removal Statutes And The Decisions Of This Court.

Looking to federal law demonstrates that the Ninth Circuit's bright line rule precluding removal when fictitious Does are named cannot be sustained. The rule conflicts with the removal statutes in at least three ways. First, under the decisions of this Court, formal or unnecessary parties are to be disregarded for the purposes of determining removability, *Salem Trust Co. v. Manufacturers' Finance Co.*, 264 U.S. 182 (1924), and fraudulent or wrongful joinder of parties cannot prevent removal. *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939). Second, removal must occur within 30 days of receipt of the summons and complaint, and if a case is not removable when filed, it must be removed within 30 days of becoming removable as disclosed through the receipt of any "amended pleading, motion, order or other paper." 28 U.S.C. § 1446(b). Third, remand is required only if it is determined prior to judgment that the case was removed improvidently and without jurisdiction; a different test applies following entry of judgment. 28 U.S.C. § 1447(c); *Grubbs v. General Electric Credit Corporation*, 405 U.S. 699 (1972). The Ninth Circuit's rule contradicts each of these firmly-established principles.

A. The Rule Conflicts With Decisions Disregarding Formal Or Unnecessary Parties, Or Fraudulently Or Wrongly-Joined Defendants.

In *Salem Trust Co. v. Manufacturers' Finance Co.*, *supra*, this Court confirmed the principle that a formal or unnecessary party did not defeat removability. There the defendant trust company, a stakeholder between two competing claimants, was not of diverse citizenship with the plaintiff. Nevertheless, the company's presence did not destroy diversity, since the company was not necessary for an adjudication of the dispute between the claimants.

This Court also has firmly held that removal cannot be prevented by the fraudulent or wrongful joinder of non-diverse parties. *See, e.g., Alabama Great Southern Ry. Co. v. Thompson*, 200 U.S. 206, 217-18 (1906); *Wecker v. National Enameling and Stamping Co.*, 204 U.S. 176, 185 (1907); *Chesapeake & Ohio R.R. Co. v. Cockrell*, 232 U.S. 146, 152 (1914) ("[T]his right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy"); *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *Chicago, Rock Island and Pacific Railway Co. v. Schwyhart*, 227 U.S. 184, 194 (1913); *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939). The statute itself provides for removal by "properly joined" defendants. 28 U.S.C. § 1441(b).

As this Court has held,

It is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove.

Pullman Co. v. Jenkins, *supra*, 305 U.S. at 541.

And, as the Court ruled in *Wilson, supra*:

[The] right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. [citation omitted] If in such a case a resident defendant is joined, the joinder, although fair upon its face, may be shown by a petition for removal to be only a sham or fraudulent device to prevent a removal . . .

Wilson, supra, 257 U.S. at 97.

This case, so typical of state court complaints,¹ illustrates the irreconcilable conflict between the state and federal policies. Having named only Ford, and having alleged that all defendants were the agents of each other, Bryant sued for a defective product (the automobile) which had caused him injury. Confronted with such a complaint containing fictitious Doe defendants, the conclusion had to be that the Does were, from a standpoint of *federal* law, formal or unnecessary parties, or fraudulently joined. Indeed, *Wilson's* definition of fraudulent joinder — parties joined “without any reasonable basis in fact and without any purpose to prosecute the cause in good faith,” *id.*, 257 U.S. at 98 — exactly described the Does at the time of removal.

¹Treatises and form books on California law advise counsel to include in their Complaints Doe allegations of the variety at issue here. *See, e.g.*, R. Weil & I. Brown, *California Practice Guide: Civil Procedure Before Trial* § 6:58.1 at 6-10 (1988); *West's California Code Forms, Civil Procedure*, § 474 at p. 475 (1981). The California Judicial Commission even has prescribed printed form complaints for use in many actions which contain pre-printed Doe allegations like the ones in this case. *See e.g.*, 10C *California Forms of Pleadings and Practice*, at 83 (1988) (example of printed form tort complaint.)

Viewing the Does as unnecessary or fraudulently joined parties is consistent with federal law, which rejects the notion of an unnamed, unidentified, non-existent Doe, whether as a plaintiff or as a defendant. For example, FED.R.CIV.P. 17(a) provides that actions shall be prosecuted in the name of the real party in interest. This rule prevents the naming of Does on the mere possibility that some unidentified claim exists on behalf of some unknown party. Thus when Rule 17 was amended in 1966, the Advisory Committee wrote:

The provision [that no action shall be dismissed on the ground of non-prosecution in a real party's name until reasonable time has elapsed] should not be misunderstood or distorted. . . . It does not mean, for example, that following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of the suspension of the limitation period.

Advisory Committee Notes to 1966 Amendment to FED.R.CIV.P. 17.

It would be anomalous for federal law to forbid suit in the name of a fictitious party, but to countenance suit against a similarly unknown party, especially for some unknown, unidentified act. Federal law indeed does not create such an anomaly. FED.R.CIV.P. 11 defines a counsel's signature on a Complaint as his certificate that the complaint is "well grounded in fact" and that this conviction was "formed after reasonable inquiry." A Complaint which contains no factual allegations against a defendant cannot be well grounded in fact; a plaintiff who merely

alleges that a defendant is somehow responsible for injury has not made his charge after reasonable inquiry. Moreover, the most venerable of authorities clearly contemplates that defendants be real entities. One cannot read the evaluation of "alien," "citizen" and "party" in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1807), without concluding that in requiring complete diversity, Chief Justice Marshall was writing of real, not fictitious parties.

The Ninth Circuit's bright line rule conflicts with these federal policies. Deferring to state law, the Ninth Circuit's rule precluding removal holds that "[t]he nature of the allegations against such Doe defendants is irrelevant for federal removal purposes." *Bryant, supra*, 844 F.2d at 605. The Ninth Circuit's rule assumes that Does are real entities. Federal law dictates instead that at the time of removal the Does be classified as formal or unnecessary or fraudulently-joined parties.

B. The Rule Conflicts With Statutory And Decisional Law Requiring Removal At The Earliest Possible Time.

The Ninth Circuit's rule reverses Congress' requirement that removal must occur at the earliest possible time. Section 1446(b) of Title 28 provides in part:

The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . .

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading,

motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

The provision for early removal reflects Congress' decision reached after unsuccessful previous legislation authorized removal at any time during litigation. See 3 Cong. Rec. 4302 (1874); *Powers v. Chesapeake & Ohio Railway*, 169 U.S. 92, 100 (1898) ("This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity."); *Bryant supra*, 844 F.2d at 610-611 (Kozinski, J., dissenting). In keeping with the requirement that removal occur as quickly as possible, this Court has held that the removability must be based on the case disclosed by the pleadings as of the time of removal. *Barney v. Latham*, 103 U.S. 205, 215 (1881).

The Ninth Circuit's rule, however, insures removal at a late stage of the litigation. Under California law a real entity can be substituted for a fictitious defendant at any time during which service of process may be made — but service may be made for a period of *three years*. CAL.CIV.PROC.CODE § 583.210 (West Supp. 1988) (formerly § 581a(a)). Thus, under the Ninth Circuit's rule, the 30 days within which Congress requires removal, 28 U.S.C. § 1446(b), can become at least three years. Often it would be longer. The Ninth Circuit rule directly says that removal *cannot* occur unless the plaintiff drops the Doe defendants or trial commences without service of the Does. *Bryant, supra*, 844 F.2d at 606 n.5. Thus, the three year period for service could expire, the Does could remain in the Complaint and trial nevertheless might not occur until sometime later — but the case still would not be removable until the trial commences. This is not mere conjecture. The time to trial in Los Angeles Superior

Court, for example (the Court from which *Bryant* was removed) often is longer than three years. See, e.g., Judicial Council of California, 1988 *Annual Report* at 103.

Even if the Ninth Circuit were correct in its bright line rule that the presence of Does prevents removal based on the Complaint, the Ninth Circuit's second rule that removability is foreclosed entirely until the Does are named, dismissed or voluntarily abandoned cannot be reconciled with the removal statutes. The only two circumstances which constitute voluntary abandonment under the Ninth Circuit's rule are the dropping of the Does or the commencement of trial without them. Therefore, these are the only two circumstances in which removal may occur when a complaint contains fictitious defendants. The statute, however, authorizes removal at any time within 30 days of receipt of "an amended pleading, motion, order or other paper" disclosing that a case has become removable. 28 U.S.C. § 1446(b). As the dissent in *Bryant* demonstrates, this Congressional language covers a variety of circumstances, ranging from answers to interrogatories or requests to admit, to letters, to papers filed in state court. Numerous reported instances show that diversity can be uncovered under just such circumstances. See, e.g., *Barngrover v. M.V. Tunisian Reefer*, 535 F.Supp. 1309 (C.D. Cal. 1982); *Fisher v. United Airlines, Inc.*, 218 F.Supp. 223 (S.D.N.Y. 1963); *Lee v. Altamil Corp.*, 457 F.Supp. 979 (M.D. Fla. 1978); *Miller v. Stauffer Chemical Co.*, 527 F.Supp. 775 (D. Kan. 1981); *Camden Industries Co. v. Carpenters Local Union, etc.*, 246 F.Supp. 252 (D. N.H.), *aff'd*. 353 F.2d 178 (1st Cir.1965). Under the Ninth Circuit's rule, all these must be disregarded. The language of the statute makes clear that Congress intended otherwise.

C. The Rule Conflicts With Statutory And Decisional Law Establishing A Different Standard For Appellate Review Of A Judgment Than For District Court Decision On a Motion To Remand.

The Ninth Circuit's bright line rule also conflicts with the statutes and decisions of this Court because the rule applies both before and after judgment. The statutes and decisions of this Court, however, establish different standards before and after judgment. Section 1447(e) of the removal statutes provides that "if at any time *before final judgment* it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case..." (emphasis added). This statute clearly differentiates between the status of a case before and after judgment. It is only *before* judgment that remand must occur if it appears that the action was removed improvidently and without jurisdiction.

In *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972), this Court held that regardless of whether a case has been properly removed, if judgment has been rendered, and if the District Court had diversity jurisdiction as between the parties governed by the judgment, the fact that there were other parties with other claims did not defeat the jurisdiction of the District Court to enter judgment. *Grubbs* held that the language of Congress was paramount, and that Congress intended that the removal statutes should be applied uniformly nationwide. *Id.* at 705.

One of the telling points in *Grubbs* was that the plaintiff had made no attempt to remand the case or otherwise challenge the District Court's jurisdiction. *Id.* at 701. Thus, whereas the impropriety of removal might have been raised before judgment, following judgment it could not be raised. The failure to object to removal or move for

remand has been a telling point in earlier decisions of this Court as well, *see, e.g., Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97-98 (1921), as it was in the District Court here. Here, the verified petition alleging that the Does were sham went unchallenged. The District Court entered judgment without considering the Does, and made explicit, in denying motions for relief under FED.R.CIV.P. 60(b), that it did *not* consider the Does to be real parties. In its ruling, the District Court emphasized that Bryant had neither objected to removal nor moved for remand, and although the court did not enter a formal order dismissing the Does, it did clearly disregard them for the purposes of entering judgment. This was, in effect, what the Ninth Circuit would have called voluntary abandonment, had it occurred in state court: proceedings for a final judgment had commenced without the equivalent of service of the Does.

The Ninth Circuit treated the proceedings differently and ordered remand, despite Bryant's failure to contest the removal. In subsequent decisions the Ninth Circuit has adhered to its rule that judgments are invalid if they were rendered when Does were listed in the Complaint but not formally dismissed. *See, e.g., Gamble v. General Foods Corporation*, 846 F.2d 51, 52-53 (9th Cir. 1988). *Grubbs*, however, and 28 U.S.C. § 1447(c), mandate a different standard: that failure to object to removal constitutes waiver of the defects — here it constitutes abandonment of the Does — once judgment has been entered.

The Ninth Circuit's *Bryant* decision therefore contradicts both the statute and *Grubbs*, solely on the basis that *Bryant* deals with Doe defendants. Thus, certiorari is necessary to rule that the presence of fictitious defendants cannot require remand after entry of judgment when

diversity jurisdiction otherwise exists at the time of judgment.

III.

The Removal Statutes Do Not Allow Remand For The Purpose Of Administrative Ease.

The theme underlying the Ninth Circuit's bright-line rule is one which has been rejected by this Court: administrative convenience. The Ninth Circuit felt it necessary to craft a rule because of perceived confusion caused by its earlier decisions. It adopted the rule that would be easiest to apply. The question, however, is whether federal jurisdiction exists; administrative ease is not a proper basis for decisions on removal and remand. *Thermtrom Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). The one point on which the majority and dissent in *Thermtrom* agree is that the contours of removal and remand are set by Congress. Those contours cannot be changed by a court's desire to fashion its own rules. See *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145 (1965) (although union, an unincorporated association, had many of the attributes of a corporation, Congress had not defined its citizenship the same and thus it was not to be treated the same.)

Congress has declined to rewrite the removal and diversity statutes. On numerous occasions, Congress has considered legislative changes to the statutes regulating diversity of citizenship, including abolition of diversity. See H.R. 9622, 95th Cong. (1978); H.R. 2202, 96th Cong. (1979); H.R. 6816, 97th Cong. (1982); H.R. 3152, 100th Cong. (1987). These proposals obviously cover removal, too. None of these proposals has become law. The Ninth Circuit's *Bryant* rule, however, effects changes in those very rules which Congress itself so far has been unwilling

to modify. To correct this error, this Court should grant certiorari.

CONCLUSION

For these reasons, the petition for certiorari should be granted.

Dated: July 14, 1988

Respectfully submitted,

HOWARD J. PRIVETT

Counsel of Record

RICHARD A. GOETTE

RALPH ZAREFSKY

MCCUTCHEN, BLACK, VERLEGER

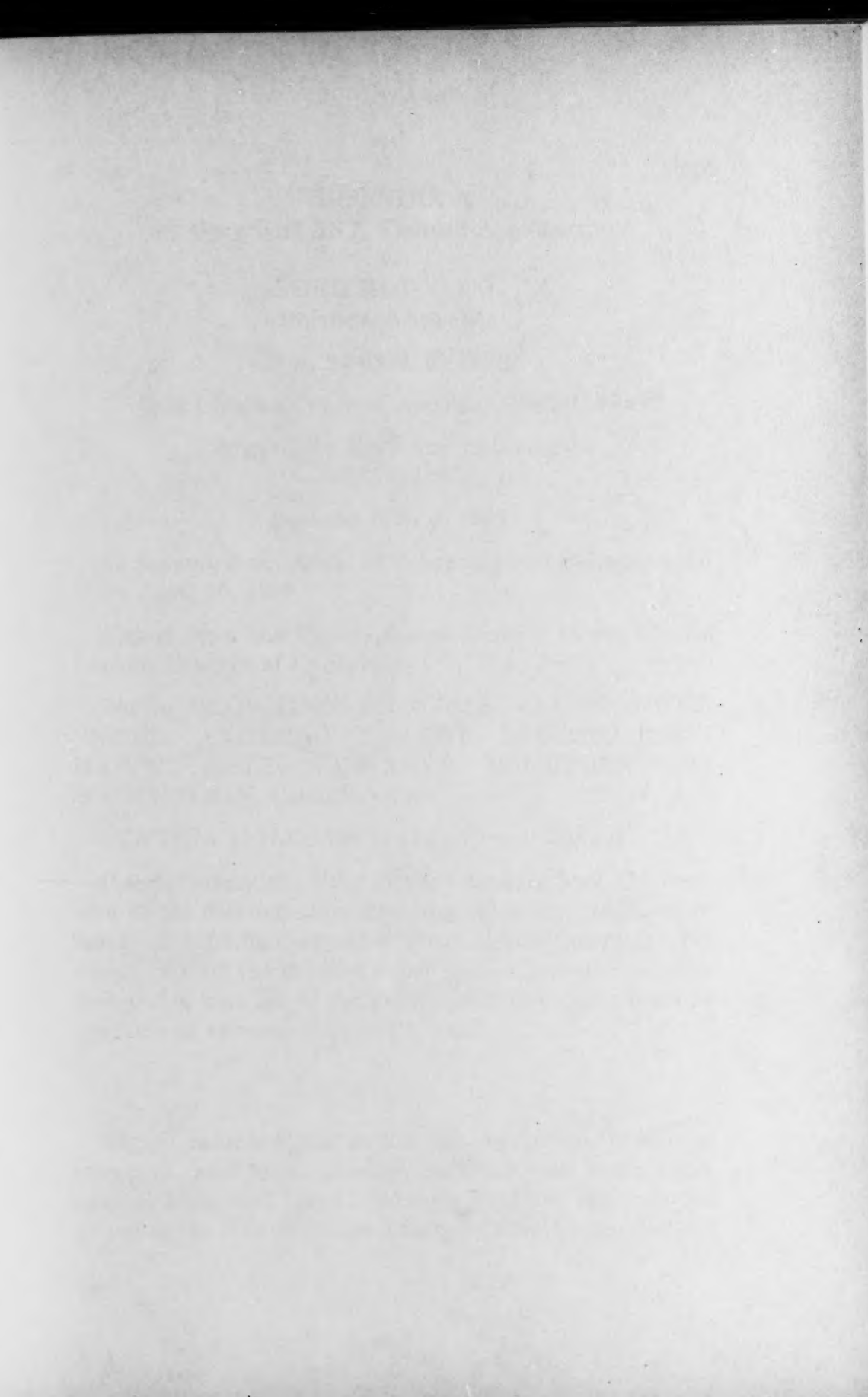
& SHEA

600 Wilshire Boulevard

Los Angeles, California 90017

(213) 624-2400

Counsel for Petitioner



APPENDIX A

Gary BRYANT, Plaintiff-Appellant,

v.

FORD MOTOR CO.,

Defendant-Appellee.

Nos. 84-6389, 85-5698.

United States Court of Appeals, Ninth Circuit.

Argued En Banc and Submitted

July 16, 1987.

Decided Nov. 6, 1987.

As Amended on Denial of Rehearing and Rehearing En Banc April 15, 1988.

Appeal from the United States District Court for the Central District of California.

Before BROWNING, Chief Judge, and GOODWIN, SNEED, ANDERSON, CANBY, NORRIS, REINHARDT, HALL, KOZINSKI, THOMPSON, and O'SCANNLAIN, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge:

Plaintiff-appellant Gary Bryant appeals from the decision of the district court granting summary judgment in favor of defendant-appellee Ford Motor Company. We conclude that the district court lacked jurisdiction over this action because of the presence of Doe defendants at the time of removal from state court.

I.

Bryant initiated this action for negligence, breach of warranty, and strict liability in California state court against Ford and Does 1 through 50. Ford removed the action to the United States District Court for the Central

District of California based upon diversity of citizenship.¹ Bryant did not object to removal. The district court took no action with respect to the Doe defendants.

Bryant seeks recovery for injuries he sustained in an accident while driving a Ford van for United Parcel Service on March 1, 1983. Bryant contends that the passive restraint system in the van was defective because it did not include a shoulder harness. Bryant's complaint alleges that Does 1 through 50 are related to each other and to Ford as "agents, servants, employees and/or joint venturers." Bryant claims that Ford and each of the Doe defendants were involved in the design, production, inspection, and distribution of the van which Bryant was driving at the time of the accident.

A joint inspection of the van by the parties on May 10, 1984 revealed that Ford had manufactured only the chassis of the van. The body and other components, including the passive restraint system, were produced by other companies as part of a joint venture. The companies responsible for producing the component parts could not

¹28 U.S.C. § 1441 (1982) provides, in relevant part, as follows:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

be identified at the time of removal or the time of inspection because the van was produced in 1968 and Ford destroyed records containing this information after ten years.

Ford moved for summary judgment. In opposing Ford's motion, Bryant noted that he planned to name Doe defendants as soon as he discovered their identities. The district court nonetheless granted summary judgment in favor of Ford, concluding that there were no material facts supporting Ford's liability because of the inspection evidence that Ford was not involved in the production of the passive restraint system.² Bryant then moved the court to add City Ford Company, the seller of the van, General Seating and Sash Company, the producer of the seats, and Grumman-Olson Company, the producer of the body, to the action and to remand the case to state court. City Ford and Grumman-Olson are California corporations. The district court denied Bryant's motion, finding that the presence of non-diverse parties was not new evidence justifying relief from judgment under Fed.R.Civ.P. 60(b) (1982).

Bryant appealed the grant of summary judgment. We granted a limited remand at Bryant's request for the district court to again reconsider its previous rulings. The district court again refused to join the additional parties, and this appeal of the district court's rulings followed.

²The district court did not enter judgment against the Doe defendants. Despite the fact that the Doe defendants were not formally dismissed, this case is properly before this court. *See Patchick v. Kensington Publishing Corp.*, 743 F.2d 675, 677 (9th Cir.1984) ("If an action is dismissed as to all of the defendants who have been served and only unserved defendants remain, the district court's order may be considered final under [28 U.S.C. § 1291] for the purpose of perfecting an appeal.").

Applying Ninth Circuit law, a panel of this court then held that because the Doe defendants in the complaint were real but unidentified people or entities, the district court could not determine whether they would defeat diversity jurisdiction once identified. *Bryant v. Ford Motor Co.*, 794 F.2d 450, 453 (9th Cir.1986). The panel remanded the case to the district court with instructions to remand to the appropriate state court. *Id.* After a petition for rehearing was filed, the panel requested en banc consideration of this case in order to clarify Doe defendant law in the Ninth Circuit. For the reasons set forth below, we now remand this case to the district court with instructions to remand to the appropriate state court.

II.

California law allows a plaintiff to sue any potential defendant whose name is unknown under a fictitious name (commonly as a Doe defendant). Cal.Civ.Proc.Code § 474 (West 1979).³ A plaintiff who names a Doe defendant in his complaint and alleges that the defendant's true name

³Cal.Civ.Proc.Code § 474 (West 1979) provides, in relevant part, as follows:

When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly; provided, that no default or default judgment shall be entered against a defendant so designated, unless it appears that the copy of the summons or other process, or, if there be no summons or process, the copy of the first pleading or notice served upon such defendant bore on the face thereof a notice stating in substance: "To the person served: You are hereby served in the within action (or proceedings) as (or on

is unknown has three years from the commencement of the action in which to discover the identity of the Doe defendant, to amend the complaint accordingly, and to effect service of the complaint. Cal.Civ.Proc.Code § 581a (West 1976).⁴

Up to this point, the general rule in the Ninth Circuit has been that the naming of Doe defendants defeats diversity jurisdiction and, therefore, that district courts should remand cases containing allegations against Doe defendants to state court. *See, e.g., Othman v. Globe Indem. Co.*, 759 F.2d 1458, 1462-63 (9th Cir.1985). This general rule has become riddled with exceptions, however. Under our cases, an action need not be remanded to state court in at least five situations: (1) when named defendants prove that the Doe defendants as described in the complaint are wholly fictitious, *see, e.g., Grigg v. Southern*

behalf of) the person sued under the fictitious name of (designating it)."

⁴When Bryant commenced this action in state court, the relevant provision was Cal.Civ.Proc.Code § 581a(a), 1982 Cal.Stat. 2574-75 (repealed 1984), which provided as follows:

(a) No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the action shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless the summons on the complaint is served and return made within three years after the commencement of the action, except where the parties have filed a stipulation in writing that the time may be extended or the party against whom the action is prosecuted has made a general appearance in the action.

This section has since been repealed, but a substantially similar provision has been enacted as Cal.Civ.Proc.Code § 583.210 (West Supp.1987).

Pacific Co., 246 F.2d 613, 619 (9th Cir.1957); (2) when the complaint contains no charging allegations against the Doe defendants, *see, e.g., Chism v. National Heritage Life Ins. Co.*, 637 F.2d 1328, 1330 (9th Cir.1981); (3) when plaintiffs unequivocally abandon their claims against the Doe defendants, *see, e.g., Southern Pac. Co. v. Haight*, 126 F.2d 900, 905 (9th Cir.), *cert. denied*, 317 U.S. 676, 63 S.Ct. 154, 87 L.Ed. 542 (1942); (4) when the complaint does not identify the Doe defendants with sufficient specificity, *see, e.g., Hartwell Corp. v. Boeing Co.*, 678 F.2d 842, 843 (9th Cir.1982); and (5) when the Doe defendants are not indispensable parties, *see, e.g., Othman*, 759 F.2d at 1463.

The numerous exceptions to the general principle that the naming of Doe defendants defeats diversity jurisdiction have led to considerable confusion as we ourselves have recognized. In *Othman*, 759 F.2d at 1462 & n. 7, we noted that "the circumstances under which an action including 'Doe' defendants may be removed to federal court [are] not entirely clear in this circuit." *See also Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 279 n. 2 (9th Cir.1984) (describing "the vague contours of when Doe pleading is specific enough to defeat diversity"). District court judges and commentators have also noted the doctrinal disarray in our decisions. *See, e.g., Goldberg v. CPC Int'l, Inc.*, 495 F.Supp. 233, 236 (N.D.Cal.1980) (circumstances under which the presence of Doe defendants destroys diversity "unfortunately remain shrouded in mystery and confusion"); Note, *Doe Defendants and Other State Relations Back Doctrines in Federal Diversity Cases*, 35 Stan.L.Rev. 297, 308 n. 38 (1982) (noting inconsistency in Ninth Circuit case law).

At the request of the three-judge panel, this court agreed to hear this case en banc in order to develop a coherent standard in the Doe defendant area. We now hold that the presence of Doe defendants under California Doe defendant law destroys diversity and, thus, precludes removal. The nature of the allegations against such Doe defendants is irrelevant for federal removal purposes. *See CTS Printex, Inc. v. American Motorists Ins. Co.*, 639 F.Supp. 1272, 1277 (N.D.Cal.1986). We overrule all of our cases creating exceptions to this general rule. *See, e.g., Grigg*, 246 F.2d at 619; *Chism*, 637 F.2d at 1330; *Hartwell*, 678 F.2d at 843; *Othman*, 759 F.2d at 1463. Under our new rule district courts will no longer have to make the near-impossible determination of when the allegations against Doe defendants are "specific" enough to defeat diversity. Instead, the 30-day time limit for removal contained in 28 U.S.C. § 1446(b) will not commence until all Doe defendants are either named, unequivocally abandoned by the plaintiff,⁵ or dismissed by the state court.⁶ If a defendant attempts to remove a case

⁵Unequivocal abandonment occurs in only two situations: (1) where the plaintiff drops the Doe defendants from the complaint or (2) where the trial commences without service of the Doe defendants. *See Haight*, 126 F.2d at 904-05.

⁶The voluntary-involuntary rule, which provides that only a voluntary act of the plaintiff can render a case removable to federal court, applies only to state court judgments on the merits against named defendants. *See, e.g., Self v. General Motors*, 588 F.2d 655 (9th Cir.1978). This rule is inapplicable to the dismissal by state courts of Doe defendants.

We recognize that our rule may lead to removal at a late stage in the proceedings. A defendant may be able to expedite removal, however, by seeking the plaintiff's consent to drop the Doe defendants. We disagree with the dissent's assumption that plaintiffs will not facilitate removal by stipulating to dismiss the Doe defendants.

prior to this time, the district court must remand the case to state court.⁷ This new rule accommodates both a plaintiff's right under California law to a three-year ex-

Dissent at 611 n. 9. Plaintiffs have an incentive to make such a stipulation in order to expedite the litigation. This is especially true in cases where Doe defendants are "phantoms." In such cases, plaintiffs will be reluctant to delay the inevitable removal of their cases, thereby delaying their day in court.

The dissent makes a number of other assumptions which we are unwilling to make. First, the dissent states that "every" civil case now filed in California contains allegations against Doe defendants and that the "vast majority" of these defendants are "procedural fictions" or "phantoms" invoked "superstitiously and without reason." See, e.g., Dissent at 608 (citation omitted), 609, 611, 611-612, 612, 613-614, 613-614, 618. We disagree. The dissent cites no evidence for its assumption that every civil case now filed in California contains allegations against Doe defendants. Moreover, when Doe defendants are named, they are frequently named because a plaintiff is unable to discover who the additional defendants are prior to filing suit. For example, in this case, it was only after discovery that Bryant was able to determine the identities of City Ford, General Seating and Sash, and Grumman-Olson.

Second, the dissent assumes that our decision will allow states to foreclose removals altogether. *Id.* at 611 n. 10. On the contrary, there is no reason to believe that states will enact Doe defendant statutes in a bad faith attempt to defeat the federal removal statute.

Finally, the dissent assumes that our solution will delay removal in "virtually every" California diversity case for three years or more. *Id.* at 613 (emphasis in original). The waiting time for obtaining a trial date, however, is considerably less than three years in most California counties. It is preposterous to assume that "virtually every" removal will be delayed for three years or more.

⁷This new rule will apply retroactively. Federal courts should remand pending cases containing allegations against unnamed Doe defendants to state court unless both parties agree to dismiss the Doe defendants.

tension of the statute of limitations and a defendant's statutory right to removal under 28 U.S.C. § 1441.⁸

III.

Because the complaint in this case contained Doe defendants as parties, removal was premature. We RE-MAND to the district court with instructions to remand to the appropriate state court. Each party shall bear its own costs on this appeal.⁹

⁸The dissent states that its solution "would eliminate *all* the problems associated with the addition of Doe defendants." *Id.* at 619 (emphasis in original). As the dissent admits, however, its solution may lead to parallel litigation in state and federal court. *Id.* at 619. We simply are not convinced that the potential for duplication of effort under our solution is any greater than under the dissent's solution.

Furthermore, the dissent claims that federal courts can accommodate a plaintiff's right to add Doe defendants by remanding the portion of the case alleging claims against the Doe defendants to state court. Absent from the dissent's analysis is any mention of what action a court should take when a plaintiff attempts to name a *diverse* Doe defendant after the 120 day time limit contained in Fed.R.Civ.P. 4(j) has expired. If such a case were remanded to state court, the diverse defendant could simply re-remove to federal court, resulting in an unwarranted ping-pong game between state and federal court. On the other hand, if the federal court were to deny the plaintiff the opportunity to name the diverse Doe defendant, it would be denying the plaintiff an important state law right.

⁹Ford also argues that in our earlier opinion we used the wrong test to determine whether the district court should have remanded the case. Ford correctly notes that Bryant did not challenge the removal before final judgment was entered. When removal is not challenged until after judgment has been entered, the standard is not whether removal was proper, but whether the district court would have had original jurisdiction if the case had been filed in that court in the posture it was in as of the time of trial or judgment. *Grubbs v.*

NORRIS, Circuit Judge, concurring:

I concur in the judgment because I agree that the district court lacked jurisdiction at the time of removal. Bryant's complaint alleged that Ford and each of the 50 Doe defendants were involved in the design, production and distribution of the Ford van which Bryant claimed had a defective passive restraint system because it did not include a shoulder harness. At the time of removal, Ford made no effort to show that no California resident could have committed acts within the charging allegations of the complaint and thus failed to carry its burden of establishing complete diversity. *See Pullman Co. v. Jenkins*, 305 U.S. 534, 540, 59 S.Ct. 347, 350, 83 L.Ed. 334 (1939) (named defendant bound to show unnamed defendant a nonresident to justify removal). It made no effort, for example, to show that no one who had any involvement in the design, production or distribution of the van was a resident of California. Consequently, I believe we should decide this case on the narrow ground that the district court lacked jurisdiction because of Ford's failure to show complete diversity at the time of removal.

Although I concur in the judgment, I cannot join the court's opinion because I agree with Judge Kozinski that the court writes too broadly. *Dissent* at 608. The court says that there can be no removal until all Does are either named, unequivocally abandoned, or dismissed in the

General Electric Credit Corp., 405 U.S. 699, 705, 92 S.Ct. 1344, 1348, 31 L.Ed.2d 612 (1972); *Gould v. Mutual Life Insurance Co.*, 790 F.2d 769, 773-74 (9th Cir.1986). Even under this standard, however, remand is required. The presence of Doe defendants destroys diversity of citizenship. Here, the Doe defendants were never dismissed. Accordingly, original jurisdiction would not have lain with the district court. *See Garter-Bare Co. v. Munsingwear, Inc.*, 650 F.2d 975, 981 (9th Cir.1980); 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3642 (1985).

state court action. *Opinion* at 605-606. This necessarily means that an action may not be removed as long as a Doe defendant continues to be named in the complaint and remains unidentified. Thus, the court effectively adopts a rule that Doe defendants are conclusively presumed to be real, not phantom or sham, and are conclusively presumed to be nondiverse. I believe that such a conclusive presumption is inconsistent with *Pullman* which I read as requiring that a nonresident defendant must be given the opportunity at the time of removal to show that no legitimate defendant is a resident. 305 U.S. at 541, 59 S.Ct. at 350 ("It is *always open* to the nonresident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove.") (emphasis provided).¹

Suppose hypothetically that Ford had filed affidavits with its removal petition showing that the van had been designed and assembled in Michigan, and that all components, including the passive restraint system, had been produced by companies outside of California, and that Bryant's employer purchased the van from a dealer in Detroit, took delivery in Detroit, and drove the van to California. Suppose further that Bryant was unable to

¹In *CTS Printex, Inc. v. American Motorists Ins. Co.*, 639 F.Supp. 1272, 1274 (N.D.Cal.1986), Judge Schwarzer gave the defendant the opportunity to show that the Doe allegations should not defeat diversity by proving that all potential defendants encompassed by the charging allegations were diverse or that the charging allegations were shams. *Id.* at 1274. Although in *CTS Printex* the defendant's affidavits failed to establish that no California resident could have committed acts within the charging allegations of the complaint, the defendant in that case was at least given the opportunity to make an evidentiary showing that all conceivably liable Doe defendants were nonresidents. *See id.* at 1274 n. 1.

come up with any evidence to controvert the facts set forth in Ford's affidavits. It seems to me that had that been the state of the record at the time the district court acted on Ford's removal petition, removal would have been proper and subject matter jurisdiction would have vested in the district court. A defendant's burden to show complete diversity when faced with Doe allegations may be a heavy one, but I see no justification for denying defendants the opportunity to try.

KOZINSKI, Circuit Judge, with whom Circuit Judge O'SCANLAIN joins, dissenting.

The court has taken this case en banc to resolve a problem that has vexed our district courts for some time: how to treat fictitious parties — so called Doe defendants — when a case is removed from state court on the basis of diversity of citizenship. That the problem is real and serious is without doubt.¹ Far more in doubt is the court's solution. The court does not explain why it has chosen that particular approach to the problem, nor does it consider alternatives that might better reconcile the relevant state and federal interests.

The court's lack of analysis reflects, perhaps, the dearth of briefing and argument on the issue. The case was

¹See, e.g., *Othman v. Globe Indem. Co.*, 759 F.2d 1458 (9th Cir.1985); *Hartwell Corp. v. Boeing Co.*, 678 F.2d 842 (9th Cir.1982); *Preaseau v. Prudential Ins. Co. of Am.*, 591 F.2d 74 (9th Cir.1979); *CTS Printex, Inc. v. American Motorists Ins. Co.*, 639 F.Supp. 1272 (N.D.Cal.1986); *Schmidt v. Capitol Life Ins. Co.*, 626 F.Supp. 1315 (N.D.Cal.1986); *Brennan v. Lerner Corp.*, 626 F.Supp. 926 (N.D.Cal.1986); see generally Note, *John Doe, Where Are You? The Effects of Fictitious Defendants on Removal Jurisdiction in Diversity Cases*, 34 Ala.L.Rev. 99 (1983); Note, *Doe Defendants and Other State Relation Back Doctrines in Federal Diversity Cases*, 35 Stan.L.Rev. 297 (1983).

presented to the en banc panel on the basis of the petition for rehearing, the opposition thereto and the reply. No additional briefing was called for. The rule the court now adopts as the law of the circuit — the so-called *CTS Printex* rule, named after the district court case where it was first announced, *CTS Printex, Inc. v. American Motorists Ins. Co.* 639 F.Supp. 1272 (N.D.Cal.1986) — was mentioned only in passing in the opposition to the petition for rehearing and the reply. It was not discussed at any detail at oral argument. No one argued against its adoption or presented any argument that might expose its flaws.²

I respectfully suggest that the court's new rule does, in fact, have serious flaws. As I discuss at greater length below, today's decision will have very serious effects on

²The court is relying, perhaps, on the fact that the rule was adopted by Judge Schwarzer, a careful and respected jurist. But Judge Schwarzer, too, adopted the rule without the benefit of argument by counsel. The issue of how to apply and implement this court's decision in *Lindley v. General Elec. Co.*, 780 F.2d 797 (9th Cir.), *cert. denied*, 476 U.S. 1186, 106 S.Ct. 2926, 91 L.Ed.2d 554 (1986), first came up during the oral argument on the motion to remand. The parties were unaware of the case but Judge Schwarzer announced that he interpreted *Lindley* to require a wholly new approach and would write an opinion. In response to counsel's request that the issue be briefed, he stated as follows:

I don't care if you want to send me a memorandum. I'm going to issue a written opinion on this, although I'll tell you now informally, I intend to grant the motion to remand, and *I don't want to have you people engage in any briefing about this*, but if you want to make a brief comment in a letter, I won't stop you from doing it . . . *I don't see any need to respond.* You can be guided accordingly.

Reporter's Transcript at 13 (July 3, 1986) (emphasis added). It thus appears that the rule the court adopts today is entirely judge-made: It has never been briefed or argued by any party to any court.

the operation of the removal statute in any state that allows Doe pleadings, as does California. Moreover, the court's bright-line rule is in large part dicta and its binding force is therefore highly questionable.

The Court's approach is particularly troubling because orders remanding cases to the state courts are ordinarily not appealable. 28 U.S.C. § 1447(d) (1982); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351-52, 96 S.Ct. 584, 593-94, 46 L.Ed.2d 542 (1976). Insofar as the court today defers or entirely forecloses a large number of removals, there may be little or no opportunity to correct any error or fine-tune the rule of decision. This should not deter us from doing what we think is necessary. But it does counsel making very sure that we are right. I am just not sure that we are.

I.

A. The Rationale of the Cases the Court Is Overruling Continues to Have Vitality

The court overrules four lines of closely related authority that attempt to distinguish between two types of Doe defendants: those that are real, but whose precise identities are unknown, and those that are procedural fictions, named only for the purpose of preserving the plaintiff's right to add defendants that he might learn about later. The cases the court overrules today stand for the proposition that where the Does are of the second variety — phantoms named solely to toll the running of the statute of limitations — they will not interfere with the exercise of federal jurisdiction. No one has made the point so eloquently as our venerable Chief Judge Emeritus in *Grigg v. Southern Pacific Co.*, 246 F.2d 613 (9th Cir.1957), the earliest of the cases the court is overruling:

Perhaps these Does have some proper place under California state practice. But it is hard to believe they serve any purpose when they are included superstitiously and without reason. Certainly their phantoms, when Does live not and are accused of nothing, should not divert the course of justice.

Id. at 620 (Chambers, J.). Similar sentiments are expressed in other cases. *See, e.g., Hartwell Corp. v. Boeing Co.*, 678 F.2d 842, 843 (9th Cir.1982); *Chism v. National Heritage Life Ins. Co.*, 637 F.2d 1328, 1330 (9th Cir.1981); *Asher v. Pacific Power & Light Co.*, 249 F.Supp. 671, 676 (N.D.Cal.1965).

This concern, it seems to me, is a legitimate one. While there may be a small number of cases where defendants are known to exist but their names are not available, there are many more cases where Doe defendants alleged in the complaint are simply procedural fictions. My understanding is that nearly every civil case now filed in California contains Doe allegations.³ The reason is simple: It would be malpractice for a lawyer to omit such allegations if there is even the remotest chance that other defendants

³The authors of a leading treatise on California practice, both Superior court judges, state that "[n]aming 'Doe' defenants can be useful in several situations: (1) Where plaintiff does not know the name of the person who injured him or her (or knows them only by nicknames or incorrect names); (2) Where plaintiff knows the name of the persons who injured him or her, but has reason to believe they were not acting alone . . . [and] (3) Where plaintiff does not know all the facts upon which liability depends, and therefore is ignorant of the defendants' liability (even if plaintiff knew their names all along)." R. Weil & I. Brown, *California Practice Guide: Civil Procedure Before Trial* § 6:58.1, at 6-10 (1985). The authors emphasize that "[i]n each of the above situations, naming 'Doe' defendants is a good practice because it 'keeps the door open.' It enables plaintiffs to join other persons when their identities or responsibility is discovered."

might turn up. This means that there is a fair number of cases — perhaps the overwhelming majority — where all the parties that will ever turn up are already before the court and the presence of Doe allegations impairs removal for absolutely no good reason.

The decisions the court overrules today attempted the difficult but important task of distinguishing the cases where Does are real but unidentified parties from those where they are nothing more than procedural fictions. What the court's opinion documents quite clearly, and what our district judges and lawyers have been telling us, is that the fine line-drawing required to separate the goats from the sheep in this fashion is too burdensome and results in too much uncertainty. *See, e.g., CTS Printex*, 639 F.Supp. at 1277.

Fair enough. The need for a bright-line rule, capable of more predictable application, is squarely presented to us. Yet this does not nullify the reasons we adopted the more complex rule in the first place. *Grigg* and its progeny pursued an important objective: preserving the authority of the federal courts to exercise jurisdiction conferred on them by an Act of Congress. That interest ought not be defeated by a state procedural device that in most instances is invoked "superstitiously and without reason." 246 F.2d at 620. We should fashion a rule that takes these concerns into account and minimizes the conflict between the federal interest in the proper exercise of removal jurisdiction and the state interests represented by the Doe pleading practice.

The rule the court adopts fails to do this. Without any discussion, the court abandons the federal interest *Grigg* and its progeny sought to protect. In Judge Chambers' words, the phantoms of Does that "live not and are

accused of nothing" are now given substance for the purpose of deferring or defeating federal jurisdiction.

If the court is intent on adopting a bright line rule, there are two from which it can choose: one that treats Doe defendants as *always* destroying diversity, and one that treats them as mere procedural fictions, *never* destroying diversity. I fear that the court has selected the wrong bright-line rule, the one that least well reconciles the relevant state and federal interests.

B. The Court's New Rule Seriously Interferes with the Federal Court's Exercise of Jurisdiction Under the Removal Statute

The court recognizes that its rule "may lead to removal at a late stage in the proceedings." Majority op. at 606, n . 6. Probably more accurate is the observation in *CTS Printex* that, under the new rule, removal "may occur on the eve of trial (if trial occurs within three years of filing of the complaint)" 639 F.Supp. at 1277. Even if trial is delayed, removal will not always be available after three years. While California law requires that defendants be served within three years, the rule is subject to a variety of exceptions and exclusions. See Cal.Civ.Proc. Code §§ 583.220-240 (West Supp.1987).⁴ In addition, the three-year rule is also subject to judicial interpretation that provides further refinements and exception. See, e.g., *Barrington v. A.H. Robins Co.*, Cal.3d 146, 157, 216 Cal.Rptr. 405, 411, 702 P.2d 563, 568 (1985).

⁴Section 583.220 allows for waiver of the three-year service period by stipulation or by defendant's general appearance. Pursuant to section 583.230, the parties may agree to extend the time for service. Finally, section 583.240 lists certain additional situations extending the time within which service must be made.

Thus, under the majority's rule, removal will be delayed to the eve of trial,⁵ to three years after filing, or to some far later time. This is very, very late indeed to be bringing cases to federal court under a statute that, by its terms, directs that removals occur within thirty days after the filing of the complaint. This wholesale delay of removals in virtually all diversity cases filed in California (and perhaps other states allowing Doe pleadings)⁶ is not only at odds with the plain statutory language, it defeats longstanding congressional policy with respect to removals and will result in a variety of practical problems.

1. *The Majority's Approach Conflicts with the Policy of the Federal Removal Statute*

The federal removal statute, 28 U.S.C. §§ 1441-1452 (1982 & Supp. III 1985), embodies congressional policy that cases brought in state court be transferred to federal court if they could have been brought there in the first place. See *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 92 S.Ct. 1344, 31 L.Ed.2d 612 (1972). This provision dates back to the Judiciary Act of 1789, 1 Stat. 73, 79 (1789), and, except for a short period during the 19th century, has reflected two policies: First, cases should be removed as early as possible in the litigation, *Powers v. Chesapeake & Ohio Ry.*, 169 U.S. 92, 100, 18 S.Ct. 264, 267,

⁵Actually, removal may be delayed to as late as the close of plaintiff's case-in-chief because, at the trial-setting conference, the court may not compel a plaintiff to drop fictitious defendants or condition the setting of trial date upon his doing so. Cal.R.Ct. 220(b).

⁶We do not know how many of the states in our circuit employ a Doe pleading procedure analogous to California's. At oral argument, one of the attorneys stated that eight of the nine states in the circuit have some procedure for suing fictitious defendants, although it is unclear just how closely they resemble California's.

42 L.Ed. 673 (1898); second, federal removal law should be consistent nationwide, unaffected by differences in state law. *Grubbs*, 405 U.S. at 705, 92 S.Ct. at 1348; *Chicago, R.I. & Pac. R.R. v. Stude*, 346 U.S. 574, 580, 74 S.Ct. 290, 294, 98 L.Ed. 317 (1954); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104, 61 S.Ct. 868, 870, 85 L.Ed. 1214 (1941). The rule the court adopts today offends both of these policies.

Legislative histories were not in the early days of the Republic what they are today (perhaps fortunately so). We therefore have little to tell us why the drafters of the first Judiciary Act required removal early in the litigation. What we do have, however, is an experiment during the Reconstruction era when removals were allowed any time before trial. This innovation was short-lived. In 1875, the date was moved back closer to the commencement of the litigation. 18 Stat. 471 (1875). Such legislative history as we have shows the obvious: The rule change was occasioned by dissatisfaction with removals so close to trial. In the course of debates on the floor of the House, Congressman Poland declared:

The third section of this bill provides that in all actions hereafter brought the application for removal shall be made at the first term of the court thereafter. That was the old law of 1789, that when the defendant sought a removal of the cause he must do so at the time of entering his appearance. But in later statutes, especially those passed during and since the war, we have provided that applications for removal may be made at any time before trial; which I think, and the committee think [sic], is very mischievous in its consequences. A party will let his case run on in a State court until he is satisfied that he will be beaten, and then dodge off into a Federal court. The third section of this bill provides

that in all suits hereafter commenced the practice shall go back to the act of 1789, and parties seeking the removal of causes shall do so at the very outset.

3 Cong.Rec. 4302 (1874).

This has been the law ever since, although the precise formula has varied from time to time.⁷ As the Supreme Court stated in *Powers*: "This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity." 169 U.S. at 100, 18 S.Ct. at 267. There is good reason for this. Late removals can be extremely disruptive, lead to serious duplication of effort and be manipulated for tactical advantage. See pp. 612-613 *infra*.

To be sure, the rule is not absolute; it does allow for slippage where the case becomes removable later in the litigation. See 28 U.S.C. § 1446(b). However, it is important to recognize that the exception is just that, an exception. It should not be allowed to swallow up the basic policy of early removal. The court's new rule thwarts this settled policy by postponing removal based on diversity of citizenship for at least three years in practically every case coming out of California, a state that is responsible for well over half of the diversity filings in the nation's largest circuit.⁸ I can think of no more effective way of undermining the congressional policy of early removal.⁹

⁷In 1949, the statute was amended to require removal within twenty days after the filing of the complaint. 63 Stat. 101 (1949). In 1965, the period was extended to thirty days after the filing of the complaint. 79 Stat. 887 (1965).

⁸1987 Annual Report of the Ninth Circuit 53.

⁹The court suggests that "[a] defendant may be able to expedite removal . . . by seeking the plaintiff's consent to drop the Doe defend-

The court's rule also undermines the congressional policy that removal procedures be uniform in the federal courts, unaffected by the vagaries of state law. The court's rule gives California — and every other state that has or can adopt a California-style Doe pleading rule — the authority to defer federal removal for years, perhaps indefinitely.¹⁰ Congress did not intend that the right to remove be manipulated by state law in this fashion. As the Supreme Court said in *Shamrock*, “[t]he removal statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization. . . .” 313 U.S. at 104, 61 S.Ct. at 870.

Moreover, deferring removals on a wholesale basis is more than a question of timing; it significantly affects the very availability of removal, impairing the exercise of a right guaranteed by Congress. Many cases are terminated early in the litigation by dismissal or summary judgment on the basis of procedural default or for some other reason. As to those cases, removal is effectively denied under the court's rule even if there is not the slightest possibility that any of the Does will materialize or that they would destroy diversity.

ants.” Majority op. at 606 n. 6. This possibility is an illusion. A plaintiff who chose the state court would have no reason to help facilitate removal. Even if so inclined, why would a plaintiff agree to drop the Doe defendants and give up the benefit of tolling the limitations period?

¹⁰Three years for adding Does happens to be the current California practice. *But see* pp. 605-606 & nn. 4-6 *supra*. The court's rationale would apply equally, however, if state law permitted five years, ten years or any other period. By making the period long enough, the state can foreclose removals altogether.

Equally troubling, delaying removal to the eve of trial, or for three or more years into the litigation, changes significantly the incentives for and against removal, subjecting it to the kind of manipulation Congress condemned when it amended the removal statute in 1875. *See* p. 610 *supra*. The decision to remove at the start of litigation is based principally, perhaps entirely, on the choice of forum, the choice Congress meant for defendants to make. On the eve of trial, a decision to remove is based on far different considerations. For one thing, the possible advantages of federal pretrial practice and case management would no longer be relevant. Moreover, a defendant would have to consider whether to remove the case and possibly expose himself to another round of discovery in district court or, conversely, whether to remove in order to subject the plaintiff thereto.

Also relevant at that point would be the outcome of various pretrial rulings. A defendant who found himself on the losing side of such rulings might view removal as an opportunity to relitigate those issues. *See* pp. 612-613 *infra*. Perhaps most obviously — and least appropriately — removals on the eve of trial can be used as devices for oppression by further delaying a plaintiff's day in court,¹¹ precisely what Congress worried about when it moved the removal date back to the start of the litigation.¹² If there are sufficient reasons for adopting a rule that so runs against the grain of the removal statute, the court does not explain what they are.

¹¹Standing the maxim on its head, defense lawyers are fond of quipping that justice delayed is justice.

¹²Fears that defendants will remove cases as they are about to go to trial are not imaginary. A number of the reported cases involved such removals. *See, e.g., Powers*, 169 U.S. at 94, 18 S.Ct. at 264; *Preaseau*, 591 F.2d at 75 (case removed during recess on first morning of trial).

2. *The Court's Rule Will Create Serious Practical Problems*

Deferring removal of all diversity cases for three years will create a number of procedural problems. For starters, this will generate a substantial duplication of effort. When a case is removed to federal court, all interlocutory rulings of the state court are subject to reconsideration by the district judge. 28 U.S.C. § 1450; *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 435-37, 94 S.Ct. 1113, 1122-23, 39 L.Ed.2d 435 (1974); *Preaseau*, 591 F.2d at 79; 1A J. Moore & B. Ringle, *Moore's Federal Practice* ¶ 0.158[4.1], at 640 (2d ed. 1987). This would include discovery rulings, decisions on summary judgment motions and interlocutory stays and injunctions. The later the removal, the more interlocutory rulings there are likely to be, and the greater the opportunity for relitigation. While federal judges may generally defer to their state colleagues on these matters, losing litigants have every incentive to seek reconsideration in the new forum. In *Preaseau*, for example, they did so and were successful. 591 F.2d at 79-83. But win or lose, the attempt will consume the time of the court and the money of the parties. When state and federal courts are barely able to handle their burgeoning caseloads, and there are frequent and justified complaints about the cost and delay of litigation, the court should be reluctant to fashion a rule that will cause such wholesale duplication of effort.

We also should not underestimate the disruption caused by plucking cases from the state courts many years after the start of litigation. Discovery may be discontinued or disrupted; pending motions would have to be withdrawn from the state court and refiled or reargued before the district court; injunctions, stays, receiverships and other equitable remedies would have to be trans-

ferred and conformed to federal procedural and bonding requirements. Various rulings may be in the process of interlocutory appeal to the state appellate courts; such appeals would be short-circuited by removal. Any trial date set by the state court would have to be cancelled, with the attendant disruption to parties and witnesses, and the case would normally take its place at the bottom of the district court's civil docket. And, all of this assumes both parties are acting in the best of faith; if one side wants to use the removal as an excuse for dragging its feet, it will find plenty of reasons for doing so. While it is difficult to predict with any accuracy what procedural problems this will spawn, it is a fair guess that there will be many more than if the cases were removed thirty days after filing of the complaint, as Congress intended.¹³ Some of these problems may occur now when the right to remove does not arise until late in the litigation. But, again, these are exceptions, rare situations that may involve an occasional disruption. It is quite a different matter when removal is delayed in virtually *every* diversity case coming out of California (and perhaps other Doe states) for three years or more.

¹³It is also worth considering that, under the court's rule, removal hinges entirely on the ruling of the state court on any motion to dismiss the Doe defendants after the three-year time period has expired. As noted earlier, this is not necessarily a routine motion calling merely for a calculation of time: There are a number of exceptions to the three-year rule, and the state court may have to make some close judgments as to whether the Does are properly out of the case. See pp. 605-606 & nn. 4-6 *supra*. What if the state court errs in that ruling? It seems odd to vest the state court with unreviewable authority to determine the timing of removal, a question of federal law.

C. The Court's New Rule Has Serious Flaws

All that having been said, I might nevertheless be willing to go along with the court's rule if I thought it represented a tenable reading of the removal statute. It does not. Indeed, in order to make the rule work at all, the court has to address situations not presented by this record; must of the court's supposedly bright-line rule is therefore dicta.

While the court's rule appears to be simple enough, it in fact deals with two rather distinct issues: (1) whether inclusion of Doe parties in the complaint destroys diversity; and (2) when Does originally pled may be deemed eliminated so that an originally non-diverse case becomes diverse. The court is certainly in a position to address the first question: We have here Doe allegations that, arguably, were sufficiently specific to destroy diversity. If the court wants to say that Doe allegations, no matter how unspecific, will always destroy diversity, it certainly may do so, although I would question the wisdom of the rule.

But the court goes much further than this. In an effort to adopt a simple rule that will solve all problems, the court goes on and addresses the second question: when Doe allegations disappear from a case by abandonment or otherwise. But the court is in no position to speak on this issue because the case before us does not present the issue of abandonment: No one has claimed that the Doe defendants have been abandoned and every indication is that the plaintiff fully intends to rely on the Doe allegations. Under these circumstances, that part of the court's bright-line rule dealing with this issue is, quite simply, dicta, and very mischievous dicta at that. Perhaps because the issue is not presented to us in a concrete controversy, the rule the court adopts runs rough-shod over the statutory language and demonstrably excludes a

variety of situations where federal jurisdiction is authorized by the removal statute.

The removal statute provides that if the case is originally not removable, the defendant may remove within 30 days after he receives "a copy of an amended pleading, motion . . . or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b). The court here reformulates this statutory standard as follows: "The 30-day time limit for removal . . . will not commence until all Doe defendants are either named, unequivocally abandoned by the plaintiff, or dismissed by the state court." Majority op. at 605-606 (footnote omitted). The first of these possibilities is tantalizing but meaningless. The typical complaint filed in the California courts pleads Does by the dozens, sometimes by the hundreds, far outnumbering the defendants that could conceivably be brought into the case. There are fifty Does in this case alone. *See* p. 615 n. 14 *infra*. The last possibility — dismissal of the Does — is real enough, but only materializes after the period for serving Does has expired.

It is the second possibility — "unequivocal abandonment" — that is the most troublesome, however. In a footnote, the court explains that "[u]nequivocal abandonment occurs in only two situations: (1) where the plaintiff drops the Doe defendants from the complaint or (2) where the trial commences without service of the Doe defendants." Majority op. at 606 n. 5 (citation omitted). The court's restrictive approach is difficult to reconcile with statutory language which provides that a case may be removed within 30 days after the defendant receives "a copy of an amended pleading, motion . . . or other paper from which it may first be ascertained that the case is one which is or has become removable." This language, I

submit, covers a wide variety of situations, not just the two enumerated in footnote 5 of the court's opinion. Consider the following:

Plaintiff writes defendant a letter advising him that he is abandoning the unserved Doe defendants. Defendant writes back requesting that plaintiff formally amend the complaint to drop the Does but plaintiff refuses to do so. This situation clearly seems to fit the statutory language as an event triggering the right to remove, yet, under the court's new rule, this would not be considered "unequivocal abandonment."

Defendant propounds requests for admission asking plaintiff to admit that there are no unknown parties left unserved. Plaintiff does not deny. Ditto.

Plaintiff files an at-issue memorandum containing the following certification: "Plaintiff is aware of no unserved parties that will be brought in the case and abandons its claims against any parties who have not been served as of this date." Ditto.

These are not wild examples; they, and countless others like them, happen every day. Our district courts and litigants will be required to confront them. The court's opinion will no doubt create a serious dilemma to those seeking to apply its teachings. On the one hand, the opinion speaks with the authority of the full court, and its rulings must be taken very seriously. On the other hand, this aspect of its ruling is so obviously dicta, and so obviously fails to follow the clear statutory language, that courts and litigants may well be tempted to shrug it off as not really meaning what it says. While defiance of binding authority is never appropriate, blindly following dicta also has its hazards.

That the court must resort to dicta to make its rule workable should be a further indication that its rule may be flawed. The difficulty, as I see it, is that the court is the captive of precedent that it is authorized to overrule but fails to reconsider. Specifically, the court fails to consider the fundamental question of the proper status of Doe defendants when a case is removed to federal court. I attempt to do so below.

II.

There are two diametrically opposed models of how Doe defendants should be viewed by the federal courts. On the one hand, they could be treated like real parties — actual flesh and blood people — whose names happen to be unknown. On the other hand, Does could be viewed as procedural fictions, magic words used by lawyers in pleadings for the sole purpose of tolling the statute of limitations against parties that might conceivably turn up. While there may be a small number of cases falling into the former category, the vast majority of Does that populate the state courts of California are of the latter type. Doe allegations, of which those here are typical,¹⁴

¹⁴Paragraphs 1 and 2 of the complaint containing what I believe are fairly standard Doe allegations provide as follows:

1. The true names and/or capacities, whether individual, corporate, associate or otherwise of defendants, DOES 1 through 50, inclusive, and each of them, are unknown to plaintiff who therefore sues said defendants by such fictitious names. Plaintiff is informed and believes, and upon such information and belief alleges, that each of the defendants fictitiously named herein as a DOE is legally responsible, negligently or in some other actionable manner, for the events and happenings hereinafter referred to and proximately caused the injuries and damages to plaintiff as hereinafter alleged. The plaintiff will seek leave of Court to amend this Complaint to insert the true names and/or

generally do not represent real people, diverse or otherwise. They should not, therefore, automatically be treated as if they do. That decision should be made on the basis of whether to do so is consistent with the Federal Rules of Civil Procedure and other relevant federal interests, including the unimpaired operation of the federal removal statute.

The Federal Rules of Civil Procedure do not provide for suing fictitious parties. Indeed, the practice is inconsistent with many of the rules and incompatible with federal procedure. *See, e.g.*, Fed.R.Civ.P. 10(a) (“[i]n the complaint the title of the action shall include the names of all the parties”); pp. 617-618 *infra*. We have repeatedly held that a suit naming Doe defendants may not be maintained in federal court. *See, e.g., Fifty Assocs. v. Prudential Ins. Co. of Am.*, 446 F.2d 1187, 1191 (9th Cir.1970); *Craig v. United States*, 413 F.2d 854, 856 (9th Cir.), *cert. denied*, 396 U.S. 987, 90 S.Ct. 483, 24 L.Ed.2d 451 (1969); *Molnar v. National Broadcasting Co.*, 231 F.2d 684, 686-87 (9th Cir.1956). Nevertheless, in a more recent case, we held that a plaintiff is entitled to the benefit of the California Doe pleading practice when his case is removed to federal court. *Lindley*, 780 F.2d 797.

capacities of such fictitiously named defendants when the same have been ascertained.

2. Plaintiff is informed and believes, and thereupon alleges, that at all times mentioned herein, defendants, and each of them, including DOES 1 through 50, inclusive, and each of them, were the agents, servants, employees and/or joint venturers of their codefendants, and were, as such, acting within the course, scope and authority of said agency, employment and/or venture and that each and every defendant, as aforesaid, when acting as a principal, was negligent in the selection and hiring of each and every other defendant as an agent, employee and/or joint venturer.

This is a critical assumption. If plaintiffs may, as a matter of right, substitute the names of real people for the Does, then the Does must be treated as real people for purposes of determining diversity of citizenship, for they may well become real at the plaintiff's option. But, it seems to me, Doe defendants are more readily treated as nullities for purposes of federal practice, seeing as they are not authorized or contemplated by our Federal Rules of Civil Procedure. If that were the case, the problems with which we have been grappling would disappear; the court could look only at the named parties for purposes of determining diversity at the time of removal; additional parties could be added later under the Federal Rules, just as in any other diversity case brought in district court.¹⁵ While the court does not discuss *Lindley*, the *Lindley* opinion plainly is the predicate for its ruling today.¹⁶ It becomes crucial, therefore, to consider whether *Lindley* was correctly decided.

California's Doe pleading practice addresses a specific issue that arises during the course of litigation: How does the filing of the lawsuit affect the running of the statute of limitations as to potential defendants whose identity is unknown at the time suit is brought? The California rule is that, for three years after filing, the plaintiff may

¹⁵The fact that parties that could destroy diversity may be added has never been a bar to removal. *Salem Trust Co. v. Manufacturers' Finance Co.*, 264 U.S. 182, 189, 44 S.Ct. 266, 267, 68 L.Ed. 628 (1924) ("[t]he right of removal depends upon the case disclosed by the pleadings when the petition therefor is filed").

¹⁶Judge Schwarzer certainly thought so in crafting the *CTS Printex* rule. He opened the oral argument on the motion for remand by citing *Lindley* and asking the lawyers to comment "if you aren't totally shellshocked by this bombshell . . ." RT at 3. He then made it clear that he considered *Lindley* to be the premise of the rule he announced in his opinion. See p. 604 n. 2 *supra*.

amend the complaint by adding such parties as a matter of right. Cal.Civ.Proc.Code §§ 474, 583.210 (West 1979 & Supp.1987). In federal court, the same problem is addressed and resolved by Fed.R.Civ.P. 15(c). Under the Federal Rule, an amendment to the complaint adding a party relates back to the date of the original pleading only if, *inter alia*, the party to be added: (1) has received notice of the action; and (2) knew or should have known that, but for the mistake in naming the original party, the action would have been brought against him.

When a diversity case is initially filed in federal court, Rule 15(c) clearly supersedes state law on relation back. See, e.g., *Santana v. Holiday Inns, Inc.* 686 F.2d 736, 738-39 (9th Cir.1982); *Britt v. Arvanitis*, 590 F.2d 57, 61-62 (3d Cir.1978). However, *Lindley* holds that when the case is first filed in state court and then removed, the Doe pleading rule is imported into the case as a matter of state substantive law, trumping Rule 15(c). 780 F.2d at 800-01.

The *Lindley* approach is foreclosed by the Supreme Court's decision in *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). *Hanna* addressed the question of what happens when there is a conflict between the Federal Rules and state law, the Federal Rule takes precedence unless, of course, the Federal Rule is invalid. The following passage from *Hanna* could not be clearer on this point:

It is true that both the [Federal Rules] Enabling Act [28 U.S.C. § 2072] and the *Erie* rule say, roughly, that federal courts are to apply state "substantive" law and federal "procedural" law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions. When a situation is covered by one of the Federal Rules,

the question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

380 U.S. at 471, 85 S.Ct. at 1144 (emphasis added; footnote omitted). See generally 3 J. Moore, *Moore's Federal Practice* ¶ 15.15[2], at 15-142 (2d ed. 1987) ("*Hanna v. Plumer* is dispositive of the issue and . . . the matter is . . . one solely of federal practice under Rule 15(c)") (footnote omitted).

Earlier this year, the Supreme Court unanimously reaffirmed the vitality of *Hanna* and further explained its scope and rationale. See *Burlington Northern R.R. v. Woods*, — U.S. —, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987). *Burlington Northern* dealt with an Alabama statute requiring that a 10 percent penalty be assessed against an unsuccessful appellant who had obtained a stay of the judgment pending appeal. The appellee in a federal diversity case removed from state court claimed the benefit of this rule, arguing that he was entitled to it as a matter of substantive state law. Speaking for the Court, Justice Marshall held that the application of the Alabama statute was foreclosed under *Hanna* by Federal Rule of Appellate Procedure 38, which provided that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

The Court first noted that "[t]he cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect

litigants' substantive rights do not violate [the Rules Enabling Act's requirement that the rule not abridge, enlarge or modify a substantive right] *if reasonably necessary to maintain the integrity of that system of rules.*" 107 S.Ct. at 970 (emphasis added). The Court then noted that Rule 38's "discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute. Moreover, the purposes underlying the Rule are sufficiently coextensive with the asserted purpose of the Alabama statute to indicate that *the Rule occupies the [state] statute's field of operation so as to preclude its application in federal diversity actions.*" *Id.* at 970-71 (emphasis added).¹⁷ The Court rejected the argu-

¹⁷In an important footnote, the Court also found the Alabama statute inconsistent with the operation of several of the other federal rules, specifically those dealing with prejudgment interest and stays pending appeal:

Rule 37 of the Federal Rules of Appellate Procedure provides further indication that the Rules occupy the Alabama statute's field of operation so as to preclude its application in diversity actions. Since the affirmance penalty only applies if a trial court's judgment is stayed pending appeal, see Ala.Code § 12-22-72 (1986), it operates to compensate a victorious appellee for the lost use of the judgment proceeds during the period of appeal. Federal Rule 37, however, already serves this purpose by providing for an award of postjudgment interest following an unsuccessful appeal. See also 28 U.S.C. § 1961.

In addition, we note that federal provisions governing the availability of a stay of judgment pending appeal do not condition the procurement of a stay on exposure to payment of any additional damages in the event the appeal is unsuccessful and, unlike the state provision in this case, allow the federal courts to set the amount of security in their discretion. Compare Fed.Rules Civ.Proc. 62(d) and 62(g) and Fed.Rule App.Proc. 8(b) with Ala.Rule App.Proc. 8(b). See also 28 U.S.C. § 1651.

ment that the state and Federal Rules were not truly in conflict because "a federal court sitting in diversity could impose the mandatory penalty and likewise remain free to exercise its discretionary authority under Federal Rule 38." *Id.* at 971. The Court stated:

This argument... ignores the significant possibility that a Court of Appeals may, in any given case, find a limited justification for imposing penalties in an amount *less than* 10% of the lower court's judgement. Federal Rule 38 adopts a case-by-case approach to identifying and deterring frivolous appeals; the Alabama statute precludes any exercise of discretion within its scope of operation.

Id. (emphasis original).

Burlington Northern puts an important gloss on *Hanna*. It stands for the proposition that there may be a conflict between the Federal Rules and state law even if there is no direct contradiction. The relevant questions are whether the Federal Rule "is reasonably necessary to maintain the integrity of [the federal] system of rules," and whether it "occupies the [state] statute's field of operation." *Id.* at 970.

Under this standard, it is clear that California's Doe pleading practice is supplanted by the Federal Rules of Civil Procedure once the case is removed to federal court. *Lindley's* contrary conclusion, 780 F.2d at 800-01, reached without the benefit of the Supreme Court's discussion in *Burlington*, is no longer plausible. We not only have direct conflicts between the operation of the state statute and the Federal Rules, *see* pp. 617-618 *infra*, we also have serious disruptions of federal procedures and, as of today, a wholesale subservience to state law of an Act of Congress dating back to the earliest days of the Republic.

Compared to this, the conflict between state and federal law in *Burlington Northern* seems like a trifle.

The conflict between state and federal procedure in this case is clear. California's Doe pleading rule has two components. First, Cal.Civ.Proc.Code § 474 provides that a defendant may be designated by a fictitious name; the real name may be substituted whenever the true identity is discovered. Next, Cal.Civ.Proc.Code § 583.210 provides that a plaintiff has up to three years after filing to serve the summons and complaint on any defendant. California courts have interpreted this to extend the time available to replace Doe defendants with named parties. *Lesko v. Superior Court*, 127 Cal.App.3d 476, 481-82, 179 Cal.Rptr. 595, 598 (1982). The analogous Federal Rules are Fed.R.Civ.P. 4(j), 15(c), 19, 20 and 21.

Rule 4(j) provides that the defendant must be served within 120 days of the filing of the complaint; absent good cause, failure to serve within this time renders the complaint subject to dismissal. This provision cannot be reconciled with Cal.Civ.Proc.Code § 583.210, which allows three years for service.¹⁸

¹⁸In *Schiavone v. Fortune*, 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986), the Supreme Court considered the relationship between Fed. R.Civ.P. 4(j)'s time-to-serve rule and a state statute of limitations. Rejecting the dissent's contrary argument, the Court held that the time allotted by Rule 4(j) to serve the complaint does *not* extend the substantive statute of limitations. *Compare id.*, 106 S.Ct. at 2385 (majority opinion) *with id.* at 2388 (Stevens, J., dissenting). *Schiavone* strongly suggests that a provision allowing a specific time for service is not the equivalent of a statute of limitations for purposes of federal law. California courts agree. *See, e.g., Atchison, T. & S.F. Ry. v. Rollaway Window Screen Co.*, 101 Cal.App.2d 763, 765-66, 226 P.2d 763, 765 (1951); *Rio Del Mar Country Club v. Superior Court*, 84 Cal.App.2d 214, 220, 190 P.2d 295, 300 (1948) ("[i]t has been

Rules 19, 20 and 21 prescribe when new parties may or must be added to complaints filed in federal court. The rules are comprehensive and give the district court broad authority to accept or reject new parties. By contrast, Cal.Civ.Proc.Code § 474 has no restrictions whatsoever; the court has no discretion; the plaintiff can bring in newly-identified parties at will. The Federal Rules and California statutes thus address exactly the same problem and resolve it in different ways, clearly occupying the same "field of operation."

Finally, Federal Rule 15(c) determines the extent to which parties added by amendment are subject to the complaint's original filing date. Under the Federal Rule, an amendment to the complaint adding a party related back to the date of the original complaint only if, *inter alia*, the party to be added: (1) has received notice of the action; and (2) knew or should have known that, but for the mistake in naming the original party, the action would have been brought against him. The state rule requires no such notice to the new party; the amendment relates back in all cases. Here again, the Federal Rules and state law reach inconsistent solutions to the same problem.

When federal law and state law address precisely the same issues and resolve them in different and inconsistent ways, the state statute would seem to be clearly preempted under the Supreme Court's analysis in *Burlington Northern, Lindley*, however, rejects this conclusion. 780 F.2d at 800-01. Not surprisingly, this leads to a variety of anomalies. Perhaps the most serious of these is that if — as *Lindley* holds — Doe pleadings must be permitted in federal court, this must surely apply to *all* diversity cases, not merely those initiated in state court

expressly held that § 581(a) is not a statute of limitations"); *Gonzales v. Bank of Am.*, 16 Cal.2d 169, 172, 105 P.2d 118, 120 (1940).

and then removed to federal district court. Fed.R. Civ.P. 4(j) then would become inapplicable to all California diversity cases, plaintiffs in all such cases having three years, not 120 days, to serve the complaint.

Similarly, if *Lindley* has identified a rule of substantive state law that we must apply under *Erie*, all California diversity plaintiffs, not merely those where the case is removed from state court, should be entitled to file a complaint in federal court naming Doe defendants, and have an absolute right to bring in real parties within three years, regardless of whether they would otherwise be permitted to do so under Fed.R.Civ.P. 19, 20 and 21. Circuit authority is squarely to the contrary. In *Molnar*, 231 F.2d at 686-87, we held that a district court diversity complaint containing Doe allegations is subject to dismissal. *Accord Fifty Assocs.*, 446 F.2d at 1191. Based on these decisions, the local rules of at least three of our district courts prohibit Doe pleadings. D.Ariz.R. 10(d); C.D.Cal.R. 3.7.2.1; S.D.Cal.R. 200-6. If *Lindley's* rationale is accepted, it overrules *Molnar* and *Fifty Associates*, and invalidates these local rules.

Lindley creates yet another conflict with one of our cases interpreting the Federal Rules. *Santana*, 686 F.2d 736, considered whether Rule 15(c) could be applied in a diversity case to extend the state statute of limitations where state law had no equivalent relation-back doctrine. Analyzing the situation under *Hanna*, we held in *Santana* that the Federal Rule trumped state law: "We conclude that *Hanna* commands application of Rule 15(c) in the face of a contrary state rule, and is thus applicable in the present case." *Id.* at 740.

Lindley attempts to distinguish *Santana* by arguing that Rule 15(c) trumps state law when it extends the state statute of limitations but not when it shortens it.

780 F.2d at 801. This takes an incongruous view of state law. Statutes of limitations provide rights for plaintiffs (to bring suit within a specified time) and for defendants (repose after that time runs). *Lindley* and *Santana* can only be reconciled under the theory that plaintiffs' state law rights are more important than those of defendants. The Federal Rules embody no such onesided principle. It seems to me that either *Santana* is right or *Lindley* is, but not both.

Finally, we ought not overlook the confusion *Doe* pleadings have caused in the district courts, confusion so severe that we convened an en banc panel to deal with the problem. It is also relevant that the en banc panel is so troubled by the problem that it has adopted a mechanical rule that will have a major impact on the operation of the removal statute, a statute that has reflected congressional policy going back to the first judiciary act. Before taking this step, it is worth considering an alternative.

Overruling *Lindley* would do much to resolve the confusion in this area of the law. If a plaintiff imports with him no right to substitute real parties for fictitious ones in federal court, the fictitious defendants have no meaning and can be disregarded in determining diversity of citizenship.¹⁹ If and when new parties are later discov-

¹⁹It is important to distinguish suing fictitious parties from real parties sued under a fictitious name. There may be times when, for one reason or another, the plaintiff is unwilling or unable to use a party's real name. See, e.g., *Roe v. Wade*, 401 U.S. 113, 120 n. 4, 93 S.Ct. 705, 710 n. 4, 35 L.Ed.2d 147 (1973). Also, one may be able to describe an individual (e.g., the driver of the automobile) without stating his name precisely or correctly. See, e.g., *Pullman Co. v. Jenkins*, 305 U.S. 534, 59 S.Ct. 347, 83 L.Ed. 334 (1939). Providing the name for an otherwise identified party would not raise any of the problems associated with substituting a real party for a fictitious one.

ered, they may be added in accordance with the Federal Rules of Civil Procedure. For the great majority of cases, where all the parties are known and the Does are procedural fictions, exclusion of the Does from the federal litigation would have no effect whatsoever.

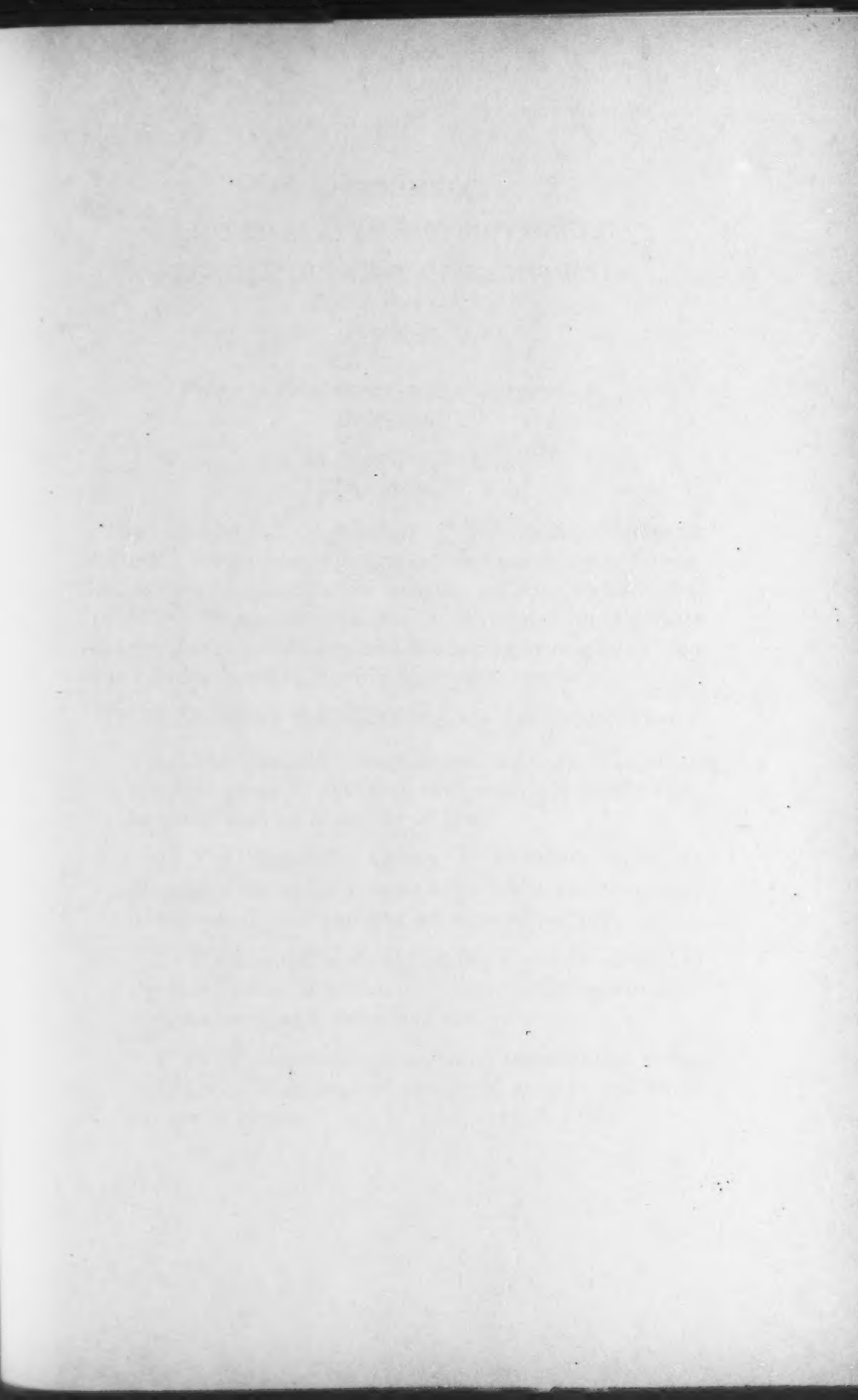
This resolution of the problem has the benefit of both simplicity and completeness. It would eliminate *all* the problems associated with the addition of Doe defendants, not just some of them. It would not matter whether the Doe allegations were specific or general; nor would a defendant have to guess whether a particular statement or pleading by the plaintiff constitutes an abandonment or waiver of his right to pursue Does, triggering the right to removal. Moreover, the decision as to removal under this rule would be made when Congress intended: very early in the litigation, before the case had an opportunity to grow roots on the state court's docket. Finally, it would make removals consistent nationwide and avoid giving states and litigants the power to manipulate the timing of federal removals. *See* p. 613 n. 13 *supra*.

This approach would not necessarily deny plaintiffs the right to pursue unknown parties as they are permitted by state law. In the first place, the Federal Rules contain liberal joinder provision and in many cases — probably most cases — a plaintiff may be able to join a newly discovered party after the litigation has begun. In any event, the rule would only apply to the federal courts. It does not, and cannot, speak to what rights the plaintiffs may have under state law. That, it seems to me, is a problem for the state courts and the state legislatures to work out. Finally, if, in individual cases, the district court is concerned that application of the federal rule will work undue hardship on a plaintiff, it can remand the Doe

allegations and allow the plaintiff to pursue the case against the Does in state court.

Conclusion

The court continues to take the law of removal in the wrong direction. Convened to solve a problem, the court only exacerbates it. While the rule it adopts may initially lessen somewhat the burdens on the district courts, it surely will not solve all the problems and may create many more. And it may well be a false economy; duplication of effort resulting from late removals may create as much work as it saves. Moreover, the court's rule sacrifices, unnecessarily I submit, important federal rights. While the decision may please those unsympathetic to diversity jurisdiction it is inconsistent with the law as Congress has written it. I respectfully, but firmly, dissent.





APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GARY BRYANT,
Plaintiff,

v.

FORD MOTOR COMPANY, a corporation,
Defendant.

No. 84 2049 PAR (Mex)
JUDGMENT

The motion of defendant Ford Motor Company ("Ford") for summary judgment and summary adjudication of issues came on for hearing on August 20, 1984, before the Honorable Pamela A. Rymer, United States District Judge presiding, and the issues having been duly heard and a decision having been duly rendered.

IT IS HEREBY ORDERED AND AJUDGED that:

1. The plaintiff's negligence claim as alleged in the first cause of action in the complaint herein shall be dismissed as a matter of law.
2. The plaintiff's breach of warranty claim as alleged in the second cause of action in the complaint herein shall be dismissed as a matter of law.
3. The plaintiff's strict liability claim as alleged in the third cause of action in the complaint herein shall be dismissed as a matter of law.
4. Ford is entitled to summary adjudication of the issues and dismissal of the first, second and third causes of action.

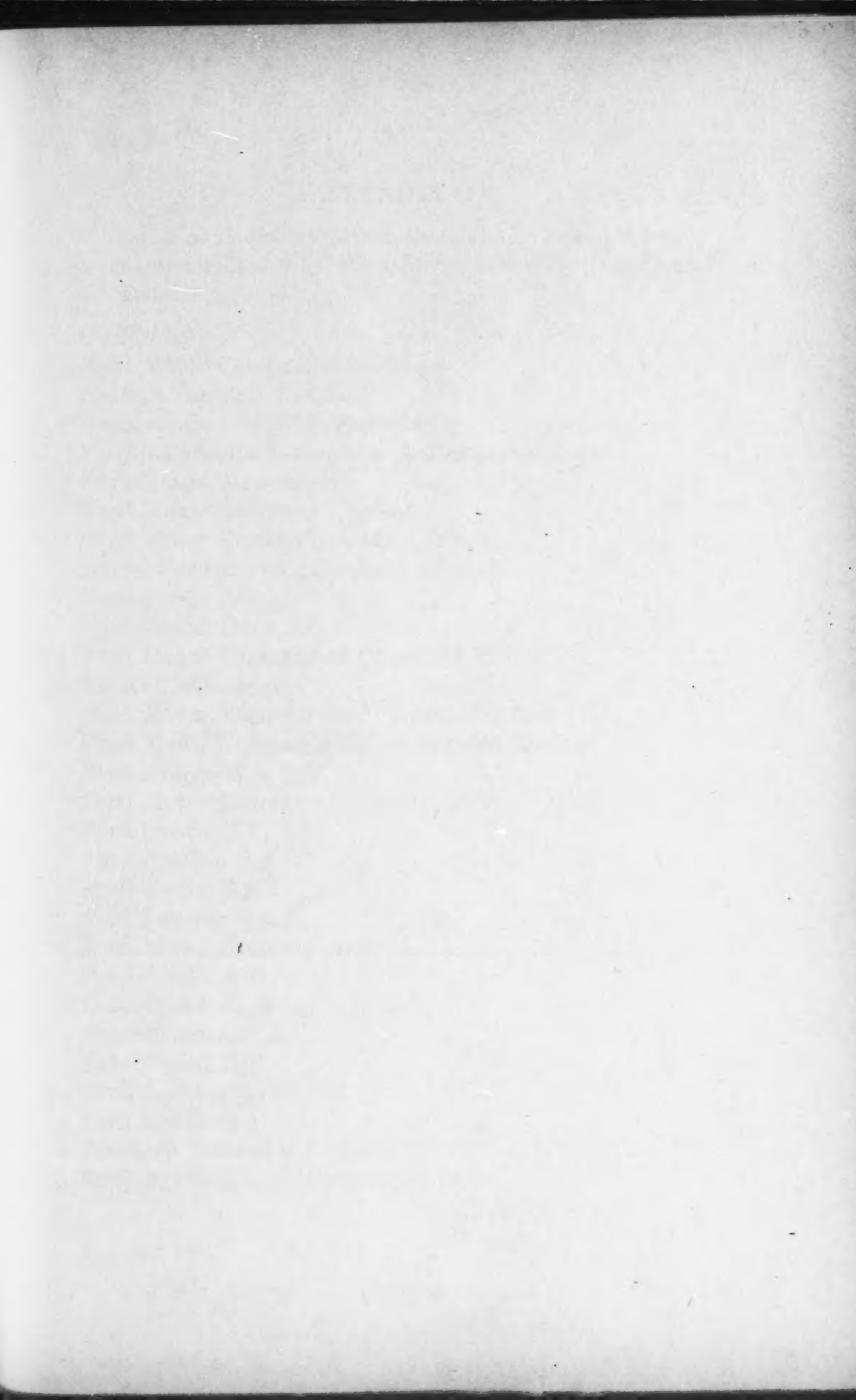
B-2

Dismissal of these causes of action shall be entered accordingly.

Dated: August 21, 1984.

/s/ PAMELA ANN RYMER

Pamela A. Rymer
United States District Judge





APPENDIX C

List of subsidiaries (other than wholly owned subsidiaries) and affiliates of Ford Motor Company (U.S. Sup. Ct. Rule 28.1)

Oy Ford Ab

Ford Motor Company Aktiebolag

Eveleth Taconite Company

Renaissance Center Partnership

Fairlane Woods Associates (A Partnership)

Park Ridge Corporation

Ford Motor Company Limited

Ford Motor Credit Company Limited

Henry Ford & Son (Finance) Limited

Ford-Werke AG

Ford Credit Bank AG

Ford Motor Company of Canada, Limited

Ensite Limited

Ford Motor Company of Australia Limited

Ford Motor Company of New Zealand Limited

Ford France S.A.

Ford Motor Company (Belgium) N.V.

Ford Credit N.V.

Ford Italiana S.p.A.

Ford Credit S.p.A.

Ford Leasing S.p.A.

Ford Motor Company A/S

Ford Credit A/S

Ford Motor Company S.A. de C.V.

Ford Nederland B.V.

Ford Credit B.V.

Ford Leasing S.A.

Ford Credit S.A.

Transeon Insurance Limited

Ford Lio Ho Motor Company, Ltd.

Bayou City Ford Truck Sales
Beltway Ford Truck Sales
Bi-State Ford Truck Sales
Bridge-Haven Ford Truck Sales
Central Ford Truck Sales
Coastal Ford Truck Sales
Crossroads Ford Truck Sales
Deacon Ford Truck Sales
Freeway Ford Truck Sales
Keystone Ford Truck Sales
Lakeland Ford Truck Sales
Liberty Ford Truck Sales
Mid-America Ford Truck Sales
Mid-Cal Ford Truck Sales
Mid-States Ford Truck Sales
Miramar Ford Truck Sales
Mission Valley Ford Truck Sales
Motor City Ford Truck, Inc.
Northside Ford Truck Sales
River City Ford Truck Sales
Sacramento Valley Ford Truck Sales
Shamrock Ford Truck Sales
Sooner State Ford Truck Sales
Southside Ford Truck Sales
Trans-West Ford Truck Sales
West Gate Ford Truck Sales
Delta Truck Lease, Inc.

In addition to the foregoing, Ford Motor Company owns varying interests in the dealers in Ford automobiles, trucks or tractors and leasing companies set forth below:

<u>Dealer</u>	<u>City</u>	<u>State</u>
Airport Lincoln-Mercury Sales	Coraopoli	PA
Albion Ford-Mercury, Inc.	Albion	MI
Allegan Ford-Mercury Sales, Inc.	Allegan	MI
Alpena Ford Lincoln-Mercury, Inc.	Alpena	MI
Altoona Ford, Inc.	Altoona	PA
Auburn Ford Lincoln-Mercury, Inc.	Auburn	AL
Aurora Lincoln-Mercury, Inc.	Aurora	CO
Avalon Lincoln-Mercury, Inc.	Carson	CA
Baranco Lincoln-Mercury, Inc.	Duluth	GA
Beloit Ford Lincoln-Mercury, Inc.	South Del	IL
Berens Lincoln-Mercury, Inc.	Chicago	IL
Buffalo Ford-Mercury, Inc.	Buffalo	MN
C & L Lincoln-Mercury, Inc.	Effingham	IL
Campus Ford, Inc.	Okemos	MI
Centralia Ford-Mercury, Inc.	Centralia	WA
Champion Ford Sales, Inc.	Niles	IL
Clinton Ford Lincoln-Mercury, Inc.	Clinton	MO
Coastal Ford, Inc.	Mobile	AL
Columbus Ford-Mercury, Inc.	Columbus	KS
Conway Ford, Inc.	Conway	SC
Copper Country Ford Lincoln-Mercury, Inc.	Houghton	MI
Cornelia Ford Lincoln-Mercury, Inc.	Cornelia	GA
County Ford, Inc.	Jennings	MO
Courtesy Ford Lincoln-Mercury, Inc.	Danville	IL
Crossroads Ford-Mercury, Inc.	Jesup	GA
Crown Lincoln-Mercury, Inc.	Sioux City	IA
Del Perry Ford, Inc.	West Memphis	AR
Delaware Ford, Lincoln-Mercury, Inc.	Delaware	OH
Delta Ford Sales, Inc.	Vicksburg	MS
Duryea Ford, Inc.	Brockport	NY
Dyersburg Ford Lincoln-Mercury, Inc.	Dyersburg	TN
Edgar Ford, Inc.	Breaux Br	LA
El Dorado Ford Lincoln-Mercury, Inc.	El Dorado	AR

<u>Dealer</u>	<u>City</u>	<u>State</u>
Empire Ford, Inc.	Spokane	WA
Fort Valley Ford, Inc.	Fort Valley	GA
Francis Scott Key Lincoln-Mercury Inc.	Frederick	MO
Freedom Ford Sales, Inc.	South Gate	CA
Frontier Lincoln-Mercury, Inc.	Depew	NY
Ft. Walton Beach Lincoln-Mercury, Inc.	Ft. Walton	FL
Geneva Ford Sales, Inc.	Geneva	NY
Gold Star Ford Lincoln-Mercury, Inc.	Shenandoah	PA
Green River Ford-Mercury, Inc.	Campbells	KY
Harbor Lincoln-Mercury, Inc.	Lorain	OH
Heritage Ford-Mercury, Inc.	Corydon	IN
Heritage Lincoln-Mercury, Inc.	Columbus	MS
Highland Lincoln-Mercury, Inc.	Highland	IN
Hilltop Ford, Inc.	Denison	TX
Hub City Ford-Mercury, Inc.	Crestview	FL
Illini Lincoln-Mercury Sales, Inc.	Champaign	IL
Independence Ford, Inc.	Clio	MI
Jim Warren Ford-Mercury, Inc.	Monmouth	IL
Lakeland Ford Lincoln-Mercury, Inc.	Herrin	IL
Leader Ford, Inc.	St. Louis	MO
Liberty Ford Lincoln-Mercury, Inc.	Centralia	IL
Lompoe Ford, Inc.	Lompoe	CA
Los Banos Ford Lincoln-Mercury, Inc.	Los Banos	CA
Madison Ford Mercury, Inc.	Rexburg	ID
Manhattan Ford Lincoln-Mercury, Inc.	New York	NY
Marion Lincoln-Mercury, Inc.	Marion	IN
McGehee Auto Plaza, Inc.	McGehee	AR
Miramar Lincoln-Mercury, Inc.	San Diego	CA
Monticello Ford Lincoln-Mercury, Inc.	Monticello	NY
Natchitoches Ford Sales, Inc.	Natchitoches	LA
New Castle Ford Lincoln-Mercury, Inc.	New Castle	IN
Noble Ford Lincoln-Mercury West, Inc.	Earlham	IA
Norris Lake Ford Lincoln-Mercury, Inc.	Lafollett	TN
North Alabama Ford-Lincoln-Mercury, Inc.	Athens	AL
Northampton Ford, Inc.	Northampton	MA
Odessa Ford Mercury, Inc.	Odessa	DE
Olympic Ford of Marysville, Inc.	Arlington	WA

<u>Dealer</u>	<u>City</u>	<u>State</u>
Ottawa Ford Lincoln-Mercury, Inc.	Ottawa	IL
Park Ford Sales, Inc.	Iowa Park	TX
Pasadena Lincoln-Mercury, Inc.	Pasadena	CA
Perry Lincoln-Mercury-Merkur, Inc.	Montgomery	AL
Plainfield Lincoln-Mercury, Inc.	Grand Rapids	MI
Robert Woodson Lincoln-Mercury	Wichita Falls	TX
Rochester Lincoln-Mercury, Inc.	Rochester	MN
Royal Lincoln-Mercury Sales, Inc.	Peoria	IL
Royal Ford Lincoln-Mercury, Inc.	West Bend	WI
Shoals Ford, Inc.	Muscle Shoals	AL
Sonoma Ford, Inc., DBA Sonoma	Sonoma	CA
Suburban Ford Lincoln-Mercury, Inc.	El Reno	OK
Sumter Ford Lincoln-Mercury, Inc.	Americus	GA
Sunbelt Ford-Mercury, Inc.	Quincy	FL
Sunrise Ford Lincoln-Mercury, Inc.	Ashtabula	OH
Tower Ford Mercury, Inc.	Fulton	MO
Town & Country Lincoln-Mercury, Inc.	Brunswick	OH
Tropical Ford, Inc.	Orlando	FL
Tuskegee Ford-Mercury, Inc.	Tuskegee	AL
Union City-Ford Lincoln-Mercury, Inc.	Union City	TN
Universal Ford Sales, Inc.	Crosby	TX
University Ford of Peoria, Inc.	Peoria	IL
Verde Valley Ford Lincoln-Mercury, Inc.	Cottonwood	AZ
Victory Ford, Inc.	Morgantown	WV
Wauseon Ford, Inc.	Wauseon	OH
Waynesboro Sales & Service, Inc.	Waynesboro	VA
West Covina Lincoln-Mercury, Inc.	West Covina	CA
West Suburban Ford, Inc.	West Des Moines	IA
Western Ford Mercury, Inc.	Clyde	OH
Westwood Ford Lincoln-Mercury, Inc.	Fort Dodo	IA

APPENDIX D

28 U.S.C. § 1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between —

(1) citizens of different States; . . .

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . .

28 U.S.C. § 1441

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim of right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed

and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction . . .

28 U.S.C. § 1446

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable. . . .

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be deter-

mined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition for the removal of the civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded. . . .

28 U.S.C. § 1447

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Cal. Civ. Proc. Code § 474

When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly; provided, that no default or default judgment shall be entered against a defendant so designated, unless it appears that the copy of the summons or other process, or, if there be no summons or process, the copy of the first pleading or notice served upon such defendant bore on the face thereof a notice stating in substance: "To the person served: You are hereby served in the within action (or proceedings) as (or on behalf of) the person sued under the fictitious name of (designating it)." The certificate or affidavit of service must state the fictitious name under which such defendant was served and the fact that notice of identity was given by endorsement upon the document served as required by this section. The foregoing requirements for entry of a default or default judgment shall be applicable only as to fictitious names designated pursuant to this section and not in the event the plaintiff has sued the defendant by an erroneous name and shall not be applicable to entry of a default or default judgment based upon service, in the manner otherwise provided by law, of an amended pleading, process or notice designating defendant by his true name.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 14, 1988, I served the within Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in re: "Ford Motor Company vs. Gary Bryant" in the United States Supreme Court, October Term, 1988, No.;

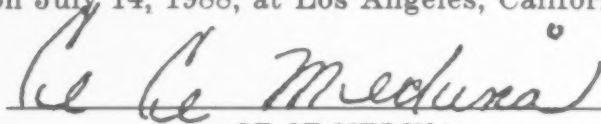
On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Charles B. O'Reilly, Esquire
Michael L. Goldberg, Esquire
Greene, O'Reilly, Broillet, Paul,
Simon, McMillan, Wheeler & Rosenberg
816 South Figueroa Street
Los Angeles, California 90017

All parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on July 14, 1988, at Los Angeles, California


CE CE MEDINA

(2)

No. 88-97

Supreme Court, U.S.

F. I L E D

AUG 12 1988

JOSEPH F. SPANOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

FORD MOTOR COMPANY,
Petitioner,

v.

GARY BRYANT,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL L. GOLDBERG
Counsel of Record
CHARLES B. O'REILLY
TIMOTHY JOHN WHEELER
GREENE, O'REILLY, BROILLET,
PAUL, SIMON & WHEELER
1000 Connecticut Avenue, N.W.
Suite 1205
Washington, D.C. 20036
(202) 293-0172
Counsel for Respondent
Gary Bryant

Dated: August 12, 1988

QUESTION PRESENTED

Where state law authorizes the filing of a complaint against fictitiously-designated (Doe) defendants when the plaintiff does not know the true names or identities of the Doe defendants, and where state law provides that if the true identities of the Doe defendants are ascertained and they are named by amended complaint and served within the statutory period, the amended complaint relates back to the date of filing of the original complaint; did the Court of Appeals err in ruling that in such a case in which Doe defendants are named, the 30-day period for removal pursuant to 28 U.S.C. Sec. 1446(b) (1982) does not commence until all Doe Defendants are either named, unequivocally abandoned by the plaintiff, or dismissed by the state court?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	5
CONCLUSION	16

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page</i>
<i>American Fire & Casualty Co. v. Finn</i> , 341 U.S. 6 (1951)	14, 15, 16
<i>Baggs v. Martin</i> , 179 U.S. 206 (1900)	14
<i>Barngrover v. M. V. Tunisia Reefer</i> , 535 F. Supp. 1309 (C.D. Cal. 1982)	12
<i>Bryant v. Ford Motor Company</i> , 794 F.2d 450 (9th Cir. 1986)	3
<i>Bryant v. Ford Motor Company</i> , 844 F.2d 602 (9th Cir. 1987).....	2, 3, 4, 5, 13
<i>Camden Industries Co. v. Carpenters Local Union, etc.</i> , 246 F. Supp. 252 (D. N.H. 1965)	12
<i>CTS Printex, Inc. v. American Motorists Ins. Co.</i> , 639 F. Supp. 1272 (N.D. Cal. 1986)	4, 6
<i>Grubbs v. General Electric Credit Corp.</i> , 405 U.S. 699 (1972)	12, 13
<i>Lee v. Altamil Corp.</i> , 457 F. Supp. 979 (M.D. Fla. 1978)	12
<i>Lindley v. General Electric Co.</i> , 780 F.2d 797 (9th Cir. 1986), <i>cert. den.</i> , 476 U.S. 1186 (1986)	6
<i>Mackay v. Unita Development Co.</i> , 229 U.S. 173 (1913)	14
<i>Miller v. Stouffer Chemical Co.</i> , 527 F. Supp. 775 (D. Kan. 1981)	12
<i>Pullman Co. v. Jenkins</i> , 305 U.S. 534 (1939)	10
<i>Ragan v. Merchants Transfer & Warehouse Co.</i> , 337 U.S. 530 (1949)	6
<i>Stewart Organization, Inc. v. Ricoh Corp.</i> , — U.S. —, 56 U.S.L.W. 4659 (June 21, 1988)	8
<i>Walker v. Armco Steel Corp.</i> , 446 U.S. 740 (1980) ..	6

Statutes

28 U.S.C. Sec. 1404(a) (1982)	8
Sec. 1441(c) (1982)	5, 6, 7, 15
Sec. 1446(b) (1982)	11, 12

TABLE OF AUTHORITIES—Continued

	Page
California Code of Civil Procedure	
Sec. 474	2
Sec. 581a (repealed)	4
Sec. 583.210	4
Federal Rule of Civil Procedure 17	10
<i>Treatise</i>	
14 Wright, Miller and Cooper, <i>Federal Practice and Procedure</i> , Sec. 3642 (2d ed. 1985)	11



IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-97

FORD MOTOR COMPANY,
Petitioner,

v.

GARY BRYANT,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Gary Bryant, (herein, "respondent" or "Bryant") opposes the petition of the Ford Motor Company (herein, "petitioner" or "Ford") for a writ of certiorari. As set forth below, the requirements for the issuance of a writ of certiorari are not satisfied, and no cause whatsoever exists for further review of this case.

COUNTERSTATEMENT OF THE CASE

While petitioner's statement of the case is essentially accurate, it is lacking in certain details which are necessary to a full understanding of the issues presented.

These additional details may be gleaned, largely, from the opinion of the Ninth Circuit.

Respondent was involved in a single-vehicle accident which rendered him a paraplegic. Within the one-year statute of limitations period, pursuant to California law, he filed a complaint for civil damages in the Los Angeles Superior Court. The complaint named as defendants the Ford Motor Company and fifty (50) fictitiously-designated defendants.

The use of fictitiously-designated defendants is authorized by Section 474 of the California Code of Civil Procedure "[w]hen the plaintiff is ignorant of the name of a defendant. . . ." As required by the California statute, the complaint stated the plaintiff's ignorance of the names of the fictitiously-designated defendants.

As the court of appeals noted, the complaint alleged that the fictitiously-designated defendants were related to each other and to Ford as "agents, servants, employees and/or joint venturers" and that Ford and each of Doe defendants were involved in the design, production, inspection and distribution of the vehicle which Bryant was driving, which vehicle the complaint alleged was defective in design and construction. *Bryant v. Ford Motor Company*, 844 F.2d 602, 603 (9th Cir. 1987). Thus, contrary to petitioner's assertion, *Petition* at 2, the complaint did contain allegations against the Doe defendants.

The case was removed to the United States District Court for the Central District of California upon Ford's verified petition. Bryant received no notice of the petition, and was first informed of the removal when served with a copy of the District Court's removal order.

In the district court, discovery revealed that petitioner had constructed only the vehicle chassis. However, as the court of appeals noted, Ford's routine record-destruction policies at that time precluded determination of the iden-

tities of the companies which had manufactured the component parts of the vehicle, including the seat and passive-restraint systems which were allegedly responsible for Bryant's injuries. *Id.* at 604.

On the basis of this discovery, however, Ford moved for summary judgment. In opposing summary judgment, Bryant noted that he intended to name the Doe defendants as soon as discovery provided him with a sufficient basis for doing so consistent with the rules of civil procedure. Nonetheless, the district court granted summary judgment in favor of Ford, on the basis that the discovery revealed no material facts supporting Ford's liability in the production of the passive-restraint system. The district court did not enter judgment against the Doe defendants. *Id.* at 604, n.2.

Bryant then moved the court to substitute City Ford Company, the seller of the vehicle, General Seating and Sash, the manufacturer of the seats, and Grumman-Olson Company, the producer of the body, for three of the fictitiously-designated defendants, and to remand the action to state court. (City Ford and Grumman-Olson are California corporations.) The district court denied the motion.

The Ninth Circuit Court of Appeals granted a limited remand of Bryant's appeal from the summary judgment to enable the district court to reconsider its previous rulings. When the district court declined to join the additional parties, Bryant again appealed.

On appeal, a three-judge panel of the court, applying Ninth Circuit law, held that the Doe defendants in the complaint were real, albeit unidentified parties, and accordingly at the time of removal, the district court was unable to determine whether complete diversity existed. The panel remanded the matter to the district court with instructions to remand the action to state court. *Bryant v. Ford Motor Company*, 794 F.2d 450, 453 (9th Cir.

1986). On Ford's petition, the matter was reheard by the court of appeals, *en banc*. Subsequent to the *en banc* decision, Ford petitioned for rehearing by the full court of appeals. The full court modified the *en banc* decision, resulting in the decision of which petitioner now seeks this Court's review.

In the modified *en banc* decision, the court of appeals noted that the California Civil Procedure Code permits a plaintiff to sue, under a fictitious designation, any potential defendant whose identity is, at the time of the filing of the complaint, unknown to the plaintiff. Where the plaintiff alleges in his complaint (as did Bryant in the instant complaint) that the true names of the fictitiously-pleaded defendants are unknown, Section 581a of the California Civil Procedure Code permits the amendment of the complaint to designate the fictitiously-pleaded defendants, and service of process, at any time within three years of the commencement of the action, upon plaintiff's ascertaining the true identity of the Doe defendants.¹ A complaint properly amended within this three-year limitation period then relates back to the date of the filing of the initial complaint.

As one court has noted, then, a plaintiff's right under California law to commence his action against fictitiously-designated defendants within the one-year statute of limitations, and then to amend the complaint to identify the Doe defendants within three years upon discovery of their true identities, is a part of the substantive limitations rules under California law, and is binding upon the federal courts under the *Erie* doctrine. See *CTS Printex, Inc. v. American Motorists Ins. Co.*, 639 F. Supp. 1272, 1275 (N.D. Cal. 1986).

¹ Subsequent to commencement of the action, Sec. 581a of the California Civil Procedure Code was repealed, and replaced with the substantially similar provisions of Sec. 583.210 of the Code of Civil Procedure. See *Bryant v. Ford Motor Co.*, *supra*, 844 F.2d at 605, n.4.

The opinion below begins with the recognition of the general rule prevailing in the Ninth Circuit—that the naming of Doe defendants in a complaint defeats diversity jurisdiction. *Bryant v. Ford Motor Company*, *supra*, 844 F.2d at 605. Then, acknowledging the reality of substantive California law, the opinion states that the nature of the allegations against the Doe defendants is irrelevant for removal purposes, and accordingly, where Does are properly pleaded in accordance with state law, the district court need not make “the near-impossible determination of when the allegations against the Doe defendants are ‘specific’ enough to defeat diversity.” *Id.* Instead, the court below ruled that the 30-day period for removal would commence only after all Doe defendants are either named, unequivocally abandoned by the plaintiff (that is, where the plaintiff drops the Doe defendants from the complaint or where trial commences without service upon the Doe defendants), or when the Does are dismissed by the state court. *Id.* at 605-06. The opinion below noted that such an approach “accommodates both a plaintiff’s right under California law to a three-year extension of the statute of limitations and a defendant’s statutory right to removal under 28 U.S.C. Sec. 1441.” *Id.* at 605.

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied. The decision of the Ninth Circuit does not conflict with any decision of this Court or any court of appeals. Since the petition raises none of the considerations governing review on certiorari set forth in Supreme Court Rule 17, this Court should deny the writ.

At the outset, it should be noted that the petition is premised on an almost hysterical view of the rule articulated by the Ninth Circuit in the subject case. Contrary to the suggestion of petitioner, the Ninth Circuit’s ruling in this case is not about *whether* a state court action in

which Doe defendants have been properly pleaded in accordance with state law may be removed to federal court pursuant to 28 U.S.C. Sec. 1441(1982); but rather is about *when* such an action may be removed. Viewed from this perspective, the decision of the Court of Appeals, as respondent will herein demonstrate, conflicts with no decision of this Court or of any other court of appeals; and represents no denial of a non-resident defendant's right to remove a case to federal court pursuant to the federal judicial code.

The petition gets off to a bad start with its very first sentence, in which petitioner asserts that the Ninth Circuit, in promulgating its rule in this case, erroneously relied upon state law when it was bound to apply federal law. Not only does this assertion ignore the rationale for the Ninth Circuit's decision, but it also ignores the substantive effect of California state law permitting the pleading of fictitious defendants. See *CTS Printex, supra*, 639 F. Supp. 1272; *Lindley v. General Electric Co.*, 780 F.2d 797, 802 (9th Cir. 1986), *cert. den.*, 476 U.S. 1186 (1986). The Ninth Circuit's recognition of the substantive effect of the California law permitting Doe pleading and relation back is consistent with rulings of this Court that service-of-process aspects are integrally related to state statutes of limitations laws, and form a substantive element of those laws. See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751-52 (1980); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949).

The Ninth Circuit did not apply state law to preclude removal in this case. Rather, it took due note of the effect of the state law with respect to the pleading of fictitiously-designated defendants in determining when removal could be possible, consistent with the substantive effects of the state law. The Ninth Circuit, thus, merely gives appropriate consideration to the substantive effect

of the California Doe pleading law. In doing so, the Ninth Circuit rule obviates the *Erie*-doctrine problems which would (and in connection with the instant case, did) result if removal is permitted before resolution of the uncertainties presented to the district court by a removal petition brought before all pleadings against fictitiously-pleaded defendants are resolved pursuant to state law.

Nor does the Ninth Circuit rule make the California pleading statute determinative of the citizenship of the fictitiously-designated defendants as petitioner asserts. *Petition* at 7. Petitioner points to nothing in the California statute which would justify such an assertion; and for good reason. Nothing in the California law establishes the California domicile of fictitiously-pleaded defendants. Nor does the Ninth Circuit opinion make the California statute determinative of a fictitiously-pleaded defendant's citizenship. Rather, the Ninth Circuit rule merely reflects the reality of the California Doe pleading law—that since the identity of the fictitiously-pleaded defendants is unknown, surely their citizenship and domiciliary status must be, likewise, unknown. Therefore, a removing defendant can never meet its burden, required by federal law, of demonstrating that complete diversity exists. Thus, the Ninth Circuit rule reflects both reality under the California pleading statute, and under 28 U.S.C. Sec. 1441 (1982)—that a removing party must demonstrate complete diversity, and the removing court must find that complete diversity exists. At most, the Ninth Circuit rule prohibits district courts from ignoring or disregarding the presence in the action of properly-pleaded, albeit fictitiously-designated defendants, where to do so would affect a plaintiff's substantive rights under state law. The Ninth Circuit rule simply defers any such removal until such time as the requisites for removal can be met and removal would not affect substantive rights available under state law.

Thus, contrary to the petitioner's assertion, there is no conflict between the Ninth Circuit opinion and this Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, — U.S. —, 56 U.S.L.W. 4659 (June 21, 1988). In *Stewart*, the Court confronted the question of whether 28 U.S.C. Sec. 1404(a) (1982) permitted a federal court, in ruling on a motion to change venue, to consider a contractual forum-selection clause which was unenforceable under the law of the state in which the district court was sitting. The Court concluded that Sec. 1404(a) did permit consideration of the contractual clause, despite the provisions of the state law, noting that Sec. 1404(a) was "doubtless capable of classification as a procedural rule," 56 U.S.L.W. at 4662, and that in that case, the federal and state rules were capable of existing side-by-side without unnecessary conflict.

Stewart presented a conflict between state and federal procedural rules. The issue here is whether a federal rule must be applied in a manner which would affect substantive rights under state law. The Ninth Circuit rule provides a way for the federal removal procedure to be applied in a manner which would not deprive the plaintiff of substantive state rights. This Court's *Stewart* decision does not require review of the Ninth Circuit rule here, since *Stewart* neither compels nor suggests that a federal court adopt a procedural rule which cuts off state substantive rights.

A second fallacious (and misleading) assumption taints the petition in this respect. The petition is redolent in its suggestion that all Doe pleadings in California (and in this case in particular) are abusive and fraudulent. There is simply no evidence to support petitioner's assertion, *Petition* at 5, that the naming of large numbers of Does with spare or non-existent allegations against them is "universal practice" in California, or in any of the other states which authorize Doe pleading.

The error of this over-generalized assumption is demonstrated by the facts of the instant case. As noted, the complaint alleged that Ford, the only named defendant, and the Doe defendants were agents and joint venturers, and that together they were responsible individually or jointly for the design, manufacture and sale of the vehicle and its component parts, the defects of which were alleged to be responsible for the plaintiff's injuries. That this was not a knee-jerk pleading was demonstrated by the fact that upon appropriate discovery, Bryant was able, despite the routine destruction of records by Ford in accordance with its established policy, to identify the manufacturers of the seat and passive-restraint systems and the body of the vehicle, as well as its ultimate supplier. Upon being able to identify them, Bryant was provided with no mechanism in the federal court which would enable him to bring those defendants into the action—while such mechanisms were available in the state court.

In this respect, petitioner errs in its argument, *Petition* at 12, that the district court must ignore the Doe defendants as non-essential or fraudulently-joined parties. Nothing in the federal law nor in this Court's decisions supports the conclusion that all fictitiously-pleaded defendants, properly pleaded in accordance with state law, are non-essential or fraudulently joined.

While, as the petition notes, *Petition* at 9, this Court has held that fraudulently or wrongfully joined parties may be ignored for purposes of determining diversity jurisdiction, the Ninth Circuit rule does not fly in the face of such holding. Rather than requiring that fraudulently or wrongfully joined parties be recognized, the Ninth Circuit rule simply establishes the circumstances under which the determination of whether the Doe defendants are wrongfully or fraudulently-joined shall be made. And the Ninth Circuit rule does so in a fashion which preserves the substantive rights of the plaintiff

under California law—rights which would be lost (as this case amply demonstrates) if removal were permitted to occur prematurely.

Thus, there is no conflict with this Court's injunction in *Pullman Co. v. Jenkins*, 305 U.S. 534, 541 (1939), that

[i]t is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove.

The Ninth Circuit rule does not prevent the non-resident defendant from doing this. It merely specifies how and when the defendant may demonstrate such, and the district court may find such, in view of the reality of the effect of the Doe pleading permitted by California law.²

This recognition of the substantive effect of the state Doe pleading statute is, contrary to petitioner's contention, *Petition* at 11-12, not inconsistent with federal law. While Federal Rule of Civil Procedure 17, as petitioner points out, prohibits an action being maintained in the name of a fictitious *plaintiff*, it does not prohibit actions being maintained against fictitiously-designated *defendants*. While the Doe-defendant pleading mechanism is not specifically authorized by the Federal Rules, it is not specifically prohibited either.

Even though the John Doe device is disfavored by many federal courts, and some courts have stated

² The wisdom and workability of this rule is demonstrated by the facts of the instant case. Discovery enabled the plaintiff to finally identify the manufacturers of the seat and passive-restraint systems, and the seller of the vehicle. Had removal not been premature, the plaintiff could have amended his complaint in state court to designate these defendants for the first three Does. If the removal question had been presented at that time, with the case in that posture, the district court would not have had to speculate that the Does were wrongfully or fraudulently-joined, and would in fact have determined that they were essential parties.

that it is not permitted in federal practice, there is no express statutory or rule prohibition against its use. Since the practice plays an important part in some states in the tolling of statute of limitations and in the procedure for acquiring personal jurisdiction, an absolute rule against its use in federal court seems unwise.

14 Wright, Miller and Cooper, *Federal Practice and Procedure*, Sec. 3642 (2d ed. 1985).

A realistic view of the Ninth Circuit rule, as one which determines not *whether* a case in which Doe defendants have been properly pleaded in accordance with state law may be removed, but *when* such a case may be removed, demonstrates that the rule is perfectly consistent with the federal policy encouraging removal at the earliest possible time in the proceedings. The Ninth Circuit rule merely defines when that time might be, in recognition of the substantive effect of the Doe pleading rules of California law. Certainly, a case is not removable on the basis of diversity before diversity can be established. Where the identity of the defendants remains unknown, diversity cannot be established.

The Ninth Circuit's requirement that the Doe allegations be either dismissed or unequivocally abandoned by the plaintiff, or that the case proceed to trial without service on the Does, is not inconsistent with the provisions of the second paragraph of 28 U.S.C. Sec. 1446(b) (1982), which authorizes removal within 30 days "after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion order or *other paper* from which it may first be ascertained that the case is one which is or has become removable." *Id.* (emphasis added). The Ninth Circuit rule merely defines the circumstances under which the district court can rationally make the requisite diversity finding.

Thus, the conflict which the petition attempts to draw between the Ninth Circuit rule and various district court

cases applying Sec. 1446(b), *Petition* at 14, simply does not exist. In *Lee v. Altamil Corp.*, 457 F. Supp. 979 (M.D. Fla. 1978) and *Miller v. Stouffer Chemical Co.*, 527 F. Supp. 775 (D. Kan. 1981), discovery provided the "other paper" upon which it could be determined that the amount in controversy met the federal jurisdictional standard. In *Camden Industries Co. v. Carpenters Local Union, etc.*, 246 F. Supp. 252 (D. N.H. 1965), interrogatory responses severed as the "other paper" upon which it could be first ascertained that an industry involved in interstate commerce was involved, thus indicating a basis for federal jurisdiction. The Ninth Circuit rule in no way delimits application of Sec. 1446(b) in these circumstances.

Even *Barngrover v. M. V. Tunision Reefer*, 535 F. Supp. 1309 (C.D. Cal. 1982), in which a removal petition filed more than 30 days after the filing of an "at issue memorandum" in state court indicating that all essential parties had been served and that no other pleadings would be filed, was held too late to effect removal, does not present a conflict with the Ninth Circuit rule. Certainly, the filing of such a memorandum by a plaintiff in a case in which Does has been properly pleaded would constitute an "unequivocal abandonment" of the Does by the plaintiff under the Ninth Circuit rule.

Nor does the Ninth Circuit rule conflict with this Court's decision in *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972). There, the Court applied a "longstanding" rule that "where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." *Id.* at 702. The *Grubbs* case was removed from Texas state court by the United States after it had been named in a cross-action. The original parties were,

respectively, citizens of Texas and New York. After a trial on the merits, to which no party objected, the district court entered judgment against General Electric on its claim and in favor of Grubbs on his claim, and dismissed the claims both of and against the United States. Since complete diversity did exist, however, between Grubbs and General Electric, the only remaining parties at the time judgment was entered, this Court ruled consistent with the "longstanding" policy that in such a circumstance, it would serve no purpose to look beyond whether federal court jurisdiction would have lain if the case was in the posture it was in at the time judgment was entered. *Id.* at 705-06.

Two significant factors distinguish *Grubbs* from the instant case, however. *First*, in *Grubbs* the judgment was entered *after trial on the merits*, to which no party objected. Here, the judgment was not entered after *trial* on the merits. *Second*, in *Grubbs*, at the time judgment had been entered, the case was disposed of as to all other defendants, and the Court could find that there was a basis for federal jurisdiction as to the parties remaining at time of judgment—since complete diversity existed between the remaining parties. In the instant case, the district court did not dismiss the action against the Doe defendants at the time it entered judgment. Therefore, a finding of complete diversity against the parties remaining in the action at the time of judgment could not be made.³

The significance of the judgment being after trial, on the merits, cannot be underplayed. As the Court pointed out in *Grubbs*, its rule there was derived from its opin-

³ The Ninth Circuit recognized the limited applicability of the rule in *Grubbs*. *Bryant v. Ford Motor Co.*, *supra*, 844 F.2d at 606, n.9. There, the court noted that since the district court had not dismissed the action with respect to the Doe defendants, complete diversity did not exist at the time the judgment was entered, and the *Grubbs* rule was inapplicable.

ions in *Baggs v. Martin*, 179 U.S. 206 (1900) and *Mackay v. Unita Development Co.*, 229 U.S. 173 (1913). In both of those cases, judgment had been entered after trial on the merits, and the jurisdictional question was raised for the first time on appeal, by the party losing in the district court, who was also the party responsible for the initial invocation of the federal court's jurisdiction. In such a circumstance, permitting the matter to go to adjudication on the merits constituted a waiver of any jurisdictional defects. This, in turn, warranted the rule that the question of the trial court's jurisdiction be decided on the basis of the status of the case at the time the judgment was entered. This Court explained these rulings in *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 16-17 (1951):

In those cases the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of the judgment. That is, if the litigation had been initiated in the federal court on the issues and between the parties that comprised the case at the time of trial or judgment, the federal court would have had cognizance of the case. This circumstance was relied upon as the foundation of the holdings. The defendant who had removed the action was held to be estopped from protesting that there was no right to removal. Since the federal court could have had jurisdiction originally, the estoppel did not endow it with a jurisdiction it could not possess.

The rule in *Grubbs*, then, avoids a sort of *second bite* at the judicial apple, in which a party may invoke the jurisdiction of the federal court, and then, upon suffering an adverse judgment, deny that same jurisdiction and try again in the state court. But application of the *Grubbs* rule where the judgment has not been after trial on the merits would only encourage a judicial shell game,

in which a case could be prematurely removed, disposed of without a trial on the merits, and then have the removal validated on the basis of the status of the parties at the time of such disposition.

Therefore, the *Grubbs* rule can be looked at as an estoppel rule and one which both promotes judicial economy and discourages *second bites* at the judicial apple. Application of the *Grubbs* rule here would instead promote judicial forum shopping, and validate premature, improper removal. Thus, the *Grubbs* test is of dubious applicability to the instant case. The Ninth Circuit rule, accordingly, cannot be viewed as inconsistent with that test.

The Ninth Circuit rule is absolutely consistent with this Court's decision in *American Fire & Casualty Co. v. Finn*, *supra*, 341 U.S. 6, a case more clearly on point. In *Finn*, after removal, pursuant to 28 U.S.C. Sec. 1441(c) (1982), and a trial on the merits, judgment was entered against the removing (non-domiciliary) party, but in favor of two other (domiciliary) defendants. The removing defendant then sought to have the judgment vacated and the case remanded to the state court. The district court denied the motion and the Court of Appeals affirmed, on the basis that the action against the foreign defendant was "separate and independent" from that against the resident defendants.

This Court reversed, finding that "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocking series of transactions, there is no separate and independent claim or cause of action under 28 U.S.C. Sec. 1441(c) (1982)," *id.* at 14, and thus that there was no right to removal. *Id.* at 16.

The Court went on, however, to hold that removal could not be validated on the basis of the status of the parties at the time judgment was entered. Since a domiciliary defendant was and remained a party defendant at the time of judgment (as did the Does in the instant

case), the Court noted that the district court would not have had original jurisdiction of the case, and "[t]he posture of the case even at the time of judgment also barred federal jurisdiction." *Id.* at 17. The Court noted:

To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them.

Id. at 18.

Grubbs does not require that the Ninth Circuit rule in the instant case apply only to cases in which no judgment has been entered. In its most expansive reading, *Grubbs* would require a different rule in a situation, not presented by the instant case, in which the judgment of the district court had been entered after a trial on the merits, and the objection to the district court's jurisdiction was being raised by the removing party. Application of the Ninth Circuit rule in the instant case, even after judgment had been entered, where the potentially domiciliary defendants remained in the case, is not inconsistent with *Grubbs* and is perfectly consistent with this Court's holding in *Finn*. This Court's review on that basis is not warranted.

CONCLUSION

The petition fails to demonstrate that the opinion of the Ninth Circuit, of which review is sought, conflicts with the opinion of any other Circuit Court of Appeals. And, as demonstrated herein, petitioner has failed to demonstrate that the Ninth Circuit rule is contrary to the decisions of this Court. The conflicts with this Court's opinions which are alleged are largely illusory; and as demonstrated, the Ninth Circuit rule is consistent with

both the spirit and the letter of the pertinent decisions of this Court.

Further, and most important, as demonstrated herein, the Ninth Circuit rule appropriately recognizes the substantive rights of the plaintiff which the California Doe-pleading statute provides, and properly and efficiently accommodates those rights with the defendant's removal rights under federal law, in a manner which obviates serious *Erie*-doctrine problems. Thus, the Ninth Circuit rule accomplishes the twin objectives of this Court's *Erie* doctrine: it discourages forum shopping by defendants by insuring that removal is not accomplished before state-law mechanisms have been utilized to determine the identity and citizenship of all defendants; and it insures that premature removal results in no inequitable administration of the law.

For these reasons, the petition should be denied.

Respectfully submitted,

MICHAEL L. GOLDBERG
Counsel of Record
CHARLES B. O'REILLY
TIMOTHY JOHN WHEELER
GREENE, O'REILLY, BROILLET,
PAUL, SIMON & WHEELER
1000 Connecticut Avenue, N.W.
Suite 1205
Washington, D.C. 20036
(202) 293-0172
Counsel for Respondent
Gary Bryant

Dated: August 12, 1988

4

No. 88-97

Supreme Court, U.S.
FILED
AUG 29 1988

JOSEPH E. SPANGLER, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

FORD MOTOR COMPANY,
Petitioner,

vs.

GARY BRYANT,
Respondent.

PETITIONER'S REPLY MEMORANDUM

HOWARD J. PRIVETT
Counsel of Record
RICHARD A. GOETTE
RALPH ZAREFSKY
MCCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017
(213) 624-2400
Counsel for Petitioner



No. 88-97

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

Ford Motor Company,
Petitioner,

VS.

GARY BRYANT,
Respondent.

PETITIONER'S REPLY MEMORANDUM

Four Arguments raised by Respondent Bryant's Brief in Opposition require Petitioner's reply.¹

First, contrary to Respondent's assertion, the Ninth Circuit has announced a rule of general application that absolutely precludes early removal under federal law when fictitious Does are named pursuant to a state pleading practice. Petitioner apparently concedes this point by stating that, if Does are present, "a removing defendant can never meet its burden, required by federal law, of demonstrating that complete diversity exists." (Opposition p. 7.) Moreover, the decision in *Bryant* directly contradicts Respondent's argument that the Ninth Circuit rule does not impair § 28 U.S.C. 1446(b) (Opposition p. 12). That statute, among other things, authorizes removal within 30 days of receipt of "an amended pleading,

¹Petitioner is a corporation. Corporate subsidiaries and affiliates have been listed in the Petition.

motion, order or other paper" disclosing that a case has become removable. The rule in *Bryant* explicitly provides that "the 30 day time limit for removal contained in 28 U.S.C. § 1446(b) will not commence until all Doe defendants are either named, unequivocally abandoned by the plaintiff or dismissed by state court." 844 F.2d at 605-06. Respondent is also incorrect in suggesting that the filing of a memorandum in state court indicating that all essential parties have been served constitutes "unequivocal abandonment" of the Does under *Bryant*. (Opposition p. 12.) The Ninth Circuit expressly stated that "unequivocal abandonment occurs in only two situations: (1) where the plaintiff drops the Doe defendants from the complaint or (2) where the trial commences without service of the Doe defendants." 844 F.2d 602 n.5.²

Second, although it is true that there is no empirical way to demonstrate that the inclusion of Doe defendants is a universal state court practice (Opposition p. 8), it is a logical inference from the many preprinted forms and treatises that recommend their use. The joinder of Doe defendants who are accused of entirely nonspecific conduct with the use of meaningless legal conclusions, is underscored by this case where it is inconceivable that 50

²Under California practice and in order to place a case on the civil trial list, a plaintiff must execute and file an At-Issue Memorandum which certifies, among other things, that all essential parties have been served. Prior to *Bryant*, one could argue that this certification amounts to unequivocal abandonment. At least one court has held that the filing of an At-Issue Memorandum, when coupled with expiration of the three statute to serve parties, constitutes an unequivocal abandonment. *Bertha v. Beech Aircraft Corp.*, 674 F.Supp. 24 (C.D. Calif. 1987). Cf. *Casparian v. Allstate Ins. Co.*, No. 87-5703, (IV.D. Cal. May 16, 1988) (available August 23, 1988, on LEXIS, Genfed library, Dist. file). *Bryant* does not endorse this interpretation.

parties could ever have been added to the action or that the allegations provided some clue as to the identity of the Does. Indeed, in interpreting Doe allegations virtually identical to those here, the Ninth Circuit itself has agreed that "[plaintiff's] complaint 'does not even provide fuel for an imaginative court to speculate as to who the Does might be.' " *Bogan v. Keene*, No. 87-5829, slip op. (9th Cir. Aug. 1, 1988).

Third, Respondent's analysis of *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972), erroneously suggests that a summary judgment is not the functional equivalent of a trial on the merits. (Opposition p. 13.) The Ninth Circuit has rejected that contention. *See Stone v. Stone*, 631 F.2d 740, 742 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981), ("We have held that the *Grubbs* rule is applicable when the merits are reached and determined on a motion for summary judgment.); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1476 (9th Cir. 1986); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209 (9th Cir. 1980); *Sheeran v. General Electric Co.*, 593 F.2d 93 (9th Cir. 1979). The judgment here was also rendered on the merits, not based upon some technical defect. In addition, the assertion that the failure of the District Court to dismiss the Doe defendants prevented a finding of complete diversity (Opposition p. 13) is a circular argument. The District Court treated the Does here as nonexistent and Respondent's contention avoids the issue of whether, after judgment was rendered, the District Court had jurisdiction over the parties as governed by the judgment.

Fourth, Respondent's claim that he was provided no mechanism in federal court to join additional defendants (Opposition p. 9) is misleading. While it is true that a plaintiff loses the benefit of the state relation back doctrine once a case has been removed to federal court, it is

not true that there is no mechanism in federal court which allows the joinder of new parties. Additional parties here could have been added under Fed.R.Civ.P. 15(c) just as in any other diversity case brought in district court.

For these reasons, and those set forth in the Petition, Petitioner urges the Court to grant certiorari.

Dated: August 25, 1988.

Respectfully submitted,

HOWARD J. PRIVETT

RICHARD A. GOETTE

RALPH ZAREFSKY

MCCUTCHEN, BLACK, VERLEGER & SHEA

Attorneys for Petitioner

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On August 25, 1988, I served the within Petitioner's Reply Memorandum to the United States Court of Appeals for the Ninth Circuit in re: "Ford Motor Company vs. Gary Bryant" in the United States Supreme Court, October Term, 1988, No. 88-97;

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

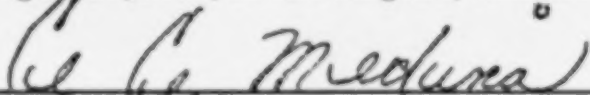
Charles B. O'Reilly, Esquire
Michael L. Goldberg, Esquire
Greene, O'Reilly, Broillet, Paul,
Simon, McMillan, Wheeler & Rosenberg
816 South Figueroa Street
Los Angeles, California 90017

Robert D. Raven
President, American Bar Association
Bruce A. Green
Marc M. Arkin
Gregory D. Huffaker, Jr.
750 N. Lake Shore Dr.
Chicago, Illinois 60611

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on August 25, 1988, at Los Angeles, California

A handwritten signature in cursive script, appearing to read "Ce Ce Medina", is written over a horizontal line.

CE CE MEDINA

⑤
No. 88-97

Supreme Court, U.S.

FILED

NOV 17 1988

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

FORD MOTOR COMPANY,
Petitioner,

VS.

GARY BRYANT,
Respondent.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR PETITIONER

HOWARD J. PRIVETT

Counsel of Record

RICHARD A. GOETTE

RALPH ZAREFSKY

MCCUTCHEN, BLACK,

VERLEGER & SHEA

600 Wilshire Boulevard

Los Angeles, California 90017

(213) 624-2400

Counsel for Petitioner

QUESTIONS PRESENTED

1. Can a state pleading practice permitting a plaintiff to name allegedly unknown defendants charged with no actionable conduct foreclose the right of removal based on diversity of citizenship under federal law?
2. In state cases that include fictitious Doe defendants, does the 30 days within which a case must be removed, 28 U.S.C. § 1446(b), commence only after the plaintiff drops the Does or the trial commences without service of the Does even though the statute provides that removability otherwise may appear through "receipt of an amended pleading, motion, order or other paper?" *Id.*
3. Where a state case that includes fictitious Doe defendants is removed without challenge, and the district court disregards the Does (no formal order of dismissal) in rendering judgment for the named defendant, must the judgment be vacated and the case remanded to state court?

PARTIES

The parties to this action are Gary Bryant, an individual, and Ford Motor Company ("Ford"), a corporation, the parties listed in the caption. Ford's corporate subsidiaries and affiliates are listed in Appendix C to the Petition for Certiorari.

The Complaint also listed as defendants "Does 1-50," but did not describe or otherwise identify them, or charge them with any actionable conduct. Following judgment plaintiff asserted that three other corporations, City Ford Company, General Seating and Sash Company, and Grumman-Olson Company also should be parties. Ford, the petitioner here, is unaware of the existence of any corporate subsidiaries or affiliates of those entities.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION.....	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT.....	7

I.

A RECENT CONGRESSIONAL BILL REQUIRES THAT THIS COURT REVERSE OR VACATE THE DECISION OF THE NINTH CIRCUIT AND REINSTATE THE JUDGMENT OF THE DISTRICT COURT	7
---	---

II.

IN ANY EVENT, THE CALIFORNIA DOE DEFENDANT PLEADING PRACTICE CAN- NOT DEPRIVE THE FEDERAL COURTS OF REMOVAL JURISDICTION.....	11
A. The Court Must Apply Federal, Not State Law	11
B. As Interpreted By the Court of Appeals, The California Doe Practice Conflicts With Fed- eral Law	13
C. Allowing California Law To Govern Over Fed- eral Law, As Does The Decision of the Court Of Appeals, Eviscerates Removal Based On Diversity	19

TABLE OF CONTENTS

Page

III.

CONTRARY TO THE RULING OF THE COURT OF APPEALS, THE REMOVAL STATUTES CONTEMPLATE REMOVAL AT THE EARLI- EST POSSIBLE TIME	22
---	----

IV.

CONTRARY TO THE RULING OF THE COURT OF APPEALS, A DIFFERENT STANDARD APPLIES FOR APPELLATE REVIEW OF A JUDGMENT THAN FOR DISTRICT COURT DECISION ON A MOTION TO REMAND	25
--	----

V.

THE REMOVAL STATUTES DO NOT ALLOW REMAND FOR THE PURPOSE OF ADMINIS- TRATIVE EASE	27
CONCLUSION	28

INDEX TO APPENDICES

APPENDIX A — Statutes Involved	A-1
APPENDIX B — Judicial Improvements and Access to Justice Act (1988)	B-1

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<i>Alabama Great Southern Ry. Co. v. Thompson</i> , 200 U.S. 206 (1906)	17
<i>Andrus v. Charlestone Stone Products Co., Inc.</i> , 436 U.S. 603 (1978)	5, 10
<i>Barnes v. Wilson</i> , 40 Cal.App.3d 199, 114 Cal.Rptr. 839 (1944)	14
<i>Barney v. Latham</i> , 103 U.S. 205 (1881)	6, 12
<i>Barngrover v. M.V. Tunisian Reefer</i> , 535 F.Supp. 1309 (C.D.Cal. 1982)	24
<i>Bradley v. School Board of City of Richmond</i> , 416 U.S. 696 (1974)	5, 11
<i>Bryant v. Ford Motor Co.</i> , 844 F.2d 602 (9th Cir. 1987)	4, 5, 23
<i>Burlington Northern R. Co. v. Woods</i> , 480 U.S. 1 (1987)	13
<i>Camden Industries Co. v. Carpenters Local Union, etc.</i> , 246 F.Supp. 252, (D. N.H.) <i>aff'd</i> 353 F.2d 178 (1st Cir. 1965)	24
<i>Carleton v. BAWW, Inc.</i> , 751 F.2d 781 (5th Cir. 1985)	10
<i>Chesapeake & Ohio R.R. Co. v. Cockrell</i> , 232 U.S. 146 (1914)	17
<i>Chicago & Northwestern Railway Co. v. Whitton</i> , 80 U.S. (13 Wall.) 270 (1872)	21
<i>Chicago Rock Island and Pacific Railway Co. v. Schwyhart</i> , 227 U.S. 184 (1913)	17
<i>Chism v. National Heritage Life Insurance Co.</i> , 637 F.2d 1328 (9th Cir. 1981)	14

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<i>City of Minneapolis v. Reum</i> , 56 F. 576 (8th Cir. 1893)	13
<i>Clark v. Stabond Corp.</i> , 197 Cal.App.3d 50, 242 Cal.Rptr. 676 (1987)	15
<i>Dedham Water Co. v. Cumberland Farms Dairy, Inc.</i> , 805 F.2d 1074 (1st Cir. 1986)	10
<i>Doe v. Bolton</i> , 410 U.S. 179 (1973)	14
<i>Fisher v. United Airlines Inc.</i> , 218 F.Supp. 223 (S.D.N.Y. 1963)	24
<i>Grigg v. Southern Pacific Co.</i> , 246 F.2d 613 (9th Cir. 1957)	14
<i>Grubbs v. General Electric Credit Corp.</i> , 405 U.S. 699 (1972)	12, 25, 26, 27
<i>Harrison v. St. Louis & San Francisco R.R. Co.</i> , 232 U.S. 318 (1914)	6, 21
<i>Illinois Central R.R. Co. v. Sheegog</i> , 215 U.S. 308 (1909)	17
<i>Lee v. Altamil Corp.</i> , 477 F.Supp. 979 (M.D. Fla. 1978)	24
<i>Louisville & N. R. Co. v. Wangelin</i> , 132 U.S. 599 (1890)	17
<i>Mas v. Perry</i> , 489 F.2d 1396 (5th Cir. 1974)	13
<i>Miller v. Stauffer Chemical Co.</i> , 577 F.Supp. 775 (D. Kan. 1981)	24
<i>Missouri Pacific Railway v. Castle</i> , 224 U.S. 451 (1912)	21
<i>Munoz v. Purdy</i> , 91 Cal.App.3d 942, 154 Cal.Rptr. 472 (1979)	14

TABLE OF AUTHORITIES

CASES

Page

<i>Phillips Petroleum Co. v. United States Environmental Protection Agency</i> , 803 F.2d 545 (10th Cir. 1986)	10
<i>Powers v. Chesapeake & Ohio Railway</i> , 169 U.S. 92 (1898)	23
<i>Pullman Co. v. Jenkins</i> , 305 U.S. 534 (1939)	16, 17
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	14
<i>Rubin v. Belo Broadcasting Corp.</i> , 769 F.2d 611 (9th Cir. 1985)	10
<i>Salem Trust Co. v. Manufacturers' Finance Co.</i> , 264 U.S. 182 (1924)	6, 16
<i>Shamrock Oil Corp. v. Sheets</i> , 313 U.S. 100 (1941)	13
<i>Southern Railway Co. v. Allison</i> , 190 U.S. 326 (1903)	21
<i>Stewart Organization, Inc. v. Ricoh Corporation</i> , 108 S.Ct. 2239 (1988)	12
<i>Stifel v. Hopkins</i> , 477 F.2d 1116 (6th Cir. 1973) ..	13
<i>Strawbridge v. Curtiss</i> , 7 U.S. (3 Cranch) 267 (1807)	18
<i>Thermtrom Products, Inc. v. Hermansdorfer</i> , 423 U.S. 336 (1976)	27
<i>Thorpe v. Housing Authority of City of Durham</i> , 393 U.S. 268 (1969)	11
<i>United States v. Alabama</i> , 362 U.S. 605, <i>reh'g denied</i> , 363 U.S. 857 (1960)	10
<i>United States v. Schooner Peggy</i> , 5 U.S. (1 Cranch) 103 (1801)	5, 11

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<i>United States v. Union Gas Co.</i> , 832 F.2d 1343 (3d Cir. 1987), <i>cert. granted</i> , 108 S.Ct. 1219 (1988)	10
<i>United Steelworkers v. R.H. Bouligny, Inc.</i> , 382 U.S. 145 (1965)	28
<i>Wayne Chemical v. Columbus Agency Service Corp.</i> , 426 F.Supp. 316 (N.D.Ind. 1977)	6
<i>Wecker v. National Enameling & Stamping Co.</i> , 204 U.S. 176 (1907)	17
<i>Wilson v. Republic Iron & Steel Co.</i> , 257 U.S. 92 (1921)	6, 17, 26
<i>Ziady v. Curley</i> , 396 F.2d 873 (4th Cir. 1968) ...	13

Constitution

United States Constitution, Art. III, § 2	19
---	----

Miscellaneous

2 CONG. REC. 4,302 (1874)	23
THE FEDERALIST, No. 80 at 478 (A. Hamilton) (New Am. Library Ed. 1961)	6, 20
H.R. 9622, 95th Cong. (1978)	28
H.R. 2202, 96th Cong. (1979)	28
H.R. 6816, 97th Cong. (1982)	28
H.R. 3152, 100th Cong. (1987)	28
H.R. REP. No. 352, 81st Cong., 1st Sess. (1949), <i>reprinted in</i> [1949] U.S. CODE CONG. SERV. 1254	25
H.R. REP. No. 100-89, 100th Cong., 2d Sess. 71 (1988)	10

TABLE OF AUTHORITIES

MISCELLANEOUS

	<u>Page</u>
Judicial Improvements and Access to Justice Act, H.R. 4807, 100th Cong., 2d Sess. <i>printed in</i> 134 Cong. Rec. H10438 (daily ed. Oct. 19, 1988)	2, 5, 7, 8, 22, 25, 26
Judicial Council of California, 1988 ANNUAL REPORT at 103	24
S. REP. No. 1830, 85th Cong., 2d Sess., <i>reprinted in</i> [1958] U.S. CODE CONG. & AD. NEWS, 3099 ...	6, 20

Rules

Federal Rules of Civil Procedure	
Rule 4(j)	26
Rule 11	18
Rule 15(c)	16
Rule 17	18
Rule 17(a)	17
Rules 19-21	16
Rule 60(b)	4, 26, 27
Rule 81(c)	26

Statutes

CALIFORNIA CODE OF CIVIL PROCEDURE	
Sec. 337	15
Sec. 339	15
Sec. 474	2, 13, 14
Sec. 581(a)	2, 14, 23
Sec. 583.210	2, 14, 23
United States Statutes	
Judiciary Act of 1789, 1 Stat. 79 (1789)	12, 20, 22

TABLE OF AUTHORITIES

STATUTES

	<u>Page</u>
14 Stat. 558 (1867)	20
18 Stat. 470 (1875)	20
25 Stat. 433 (1888)	20
36 Stat. 1091-95 (1911)	20
63 Stat. 89 (1949)	20
United States Code, Title 28	
Sec. 1254(1)	2
Sec. 1332	2, 20
Sec. 1404(a)	12
Sec. 1441	2
Sec. 1441(a)	8
Sec. 1446	2
Sec. 1446(b)	i, 6, 20, 22, 23, 24
Sec. 1446(c)	8
Sec. 1447	2
Sec. 1447(c)	25
Sec. 2101	2

Textbooks

10C CALIFORNIA FORMS OF PLEADINGS AND PRACTICE, at 83 (1988)	15
Hogan, <i>California's Unique Doe Defendant Practice: A Fiction Stranger than Truth</i> , 30 STAN. L. REV. 51 (1977)	15
1A J. MOORE & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 0.157[2] at 47 (2d ed. 1987)	21

TABLE OF AUTHORITIES

TEXTBOOKS

	<u>Page</u>
R. WEIL & I. BROWN, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL § 6:58.1 at 6-10 (1985)	15
WEST'S CALIFORNIA CODE FORMS, CIVIL PROCE- DURE, § 474 at 475 (1981)	15



No. 88-97

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

FORD MOTOR COMPANY,
Petitioner,

VS.

GARY BRYANT,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Petitioner Ford Motor Company respectfully urges this Court to reverse or vacate the decision of the United States Court of Appeals for the Ninth Circuit, and to reinstate the Judgment of the district court.

OPINIONS BELOW

The Amended Opinion of the Ninth Circuit vacating the judgment of the district court is reported in 844 F.2d 602 (9th Cir. 1988), and appears as Appendix A to the Petition for Certiorari. The district court's Summary Judgment was unreported, and appears as Appendix B to the Petition; no findings or conclusions were entered.

JURISDICTION

Ford based jurisdiction in the district court on 28 U.S.C. § 1441, asserting that the action, originally brought in state court, could have been brought in federal court pursuant to 28 U.S.C. § 1332, and was timely removed. The jurisdiction of this court rests on 28 U.S.C. § 1254(1), since this is an action in which a court of appeals has rendered a final judgment. After consideration by a panel of the Ninth Circuit, and rehearing by a limited *en banc* panel under Ninth Circuit Rule 35-3, a timely Petition for Rehearing by the full court of appeals was made. The Ninth Circuit then amended its opinion and denied rehearing on April 15, 1988. The Petition for Certiorari was filed on July 14, 1988, within the 90 days allowed by 28 U.S.C. § 2101. On October 3, 1988, this Court granted the Petition.

STATUTES INVOLVED

This case involves 28 U.S.C. §§ 1332, 1441, 1446, 1447, and California Code of Civil Procedure Sections 474 and 583.210 (formerly 581(a)), the pertinent portions of which are set forth in Appendix A to this brief. Congressional legislation supplementing 28 U.S.C. §§ 1441, 1446, and 1447, pursuant to the Judicial Improvements and Access to Justice Act, H.R. 4807, 100th Cong., 2d Sess., *printed in* 134 CONG. REC. H 10430 *et seq.* (daily ed. Oct. 19, 1988), is reflected in Appendix B.

STATEMENT OF THE CASE

On March 1, 1983, respondent Gary Bryant, a citizen of California, was involved in an automobile accident while driving a 15-year old van. Nearly a year later he sued Ford, not a citizen of California, in Los Angeles Superior Court, alleging breach of warranty, negligence, and strict

liability. The gravamen of the Complaint was that the vehicle Bryant drove was defective in some unspecified manner. Bryant sued no other defendants by name. (J.A. 7-14.)

Bryant did, however, also list as defendants "Does 1-50." His Complaint contained no factual allegations that any particular Doe engaged in any particular conduct. Rather, in conclusory terms, and on "information and belief," Bryant alleged that each Doe was "legally responsible, negligently or in some other actionable manner" for events referred to in the Complaint, and that all defendants, including all Does, were the "agents, servants, employees and/or joint venturers of their co-defendants" and were acting within the course and scope of such agency, employment or joint venture. (J.A. 7-8.)

Within 30 days of receiving the summons and complaint, Ford filed its verified petition for removal, and served the petition upon Bryant. (J.A. 15-24.) Ford alleged that there were no factual averments against the Does and that allegations against the Does were sham. (J.A. 17.) Ford's verified contentions went unanswered by Bryant who neither objected to removal nor moved to remand. Consequently, the case went forward in federal court. There, discovery disclosed that Bryant actually complained of a defective seat and seat belt restraint system. (J.A. 64-67.) When Ford demonstrated that it manufactured only the chassis, and did not manufacture or install the seat or seat belt restraint system, the district court granted summary judgment in Ford's favor. (J.A. 135-136.)

At the time judgment was entered, Bryant had made no motion contesting the district court's jurisdiction. Nor had he sought to add additional parties by amendment, despite mention in his court papers that he intended to name the Does when he later discovered their identities.

Following entry of judgment, he did move to add three entities as defendants, City Ford Company, General Seating and Sash Company, and Grumman-Olson Company. (J.A. 144-152.) Two of these entities allegedly were California corporations, which, had they been parties when the action was filed, would have destroyed diversity and prevented removal. The district court denied Bryant's motions to add parties post-judgment, finding that Bryant knew of these parties prior to judgment but nevertheless had made no motion concerning them, and that there was no excusable neglect under Federal Rules of Civil Procedure 60(b) for the delay in bringing those entities to the Court's attention. (J.A. 173-175.)

On appeal, the Ninth Circuit vacated the judgment and ordered the District Court to remand the action to state court. *Bryant v. Ford Motor Co.*, 844 F.2d 602 (9th Cir. 1987) (en banc) (as amended on denial of Rehearing and Rehearing En Banc April 15, 1988). In its opinion, the Ninth Circuit overruled four prior Ninth Circuit opinions, and created a new "bright line" rule for determining when the presence of fictitious Doe defendants destroys diversity of citizenship, thereby preventing removal. Under this new "bright line" rule, unless a plaintiff substitutes real persons for such Does or the Does are dismissed, a case containing such Does in the caption — no matter whether it be 1 Doe or 100 Does — can be removed *only* if the plaintiff unequivocally abandons the Does. *Id.* at 605-06. Unequivocal abandonment, the Ninth Circuit held, "occurs in only two situations: (1) where the plaintiff drops the Doe defendants from the complaint or (2) where the trial commences without service of the Doe defendants." *Id.* 844 F.2d at 606 n.5. Finally, the Court made its new "bright-line" rule applicable to all pending cases, *id.* at 606 n.7, requiring all courts within the Ninth Circuit to remand cases which had been removed with Does in the Complaint.

SUMMARY OF ARGUMENT

A pleading practice under state law whereby a plaintiff may sue fictitious Doe defendants does not prevent removal to federal court based on diversity of citizenship. Removability turns not on the nature of a state's practice, which raises a question of state law, but rather on whether federal jurisdiction exists, which presents a question of federal law.

Recently, Congress passed legislation which will supplement the removal statutes and make clear that the opinion of the Court of Appeals should be reversed or vacated. As passed by Congress, the bill explicitly states that "[f]or purposes of removal . . . the citizenship of defendants sued under fictitious names shall be disregarded." Judicial Improvements and Access to Justice Act, H.R. 4807, 100th Cong., 2d Sess. § 1016(a), *printed in* 134 Cong. Rec. H 10438 (daily ed. Oct. 19, 1988). As of the date this brief is printed the bill is before the President. Petitioner will promptly advise the Court when the President acts on the bill.

Assuming enactment, this new law will govern the disposition of this case. *Andrus v. Charlestone Stone Products Co., Inc.*, 436 U.S. 603, 607 n.6 (1978); *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711 (1974); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). Accordingly, the Court of Appeals' opinion, which held that "the presence of Doe defendants under California Doe Defendant law destroys diversity and, thus, precludes removal," *Bryant*, 844 F.2d at 605, then must be reversed; Congress has stated exactly the contrary.

Even without consideration of the new law, however, it is clear that state court Doe pleading cannot preclude removal. Fictitious Doe defendants are a device under

California state court pleading which allows plaintiffs to add defendants after the action is filed and have the amendment relate back to the time of filing. Under federal law, however, removability is determined by the facts at the time of the Complaint, *Barney v. Latham*, 103 U.S. 205 (1881). The fact that parties might be added later does not prevent removal. *Wayne Chemical v. Columbus Agency Service Corp.*, 426 F.Supp. 316, 318 (N.D.Ind. 1977). Furthermore, nominal or fraudulently-joined defendants must be disregarded for the purposes of removal, *Salem Trust Co. v. Manufacturers' Finance Co.*, 264 U.S. 182 (1924); *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921). Doe defendants who do not exist at the time of removal can hardly enjoy a higher status than existing parties who are nominal or fraudulently-joined.

To allow a state to prevent removal by the expedient of Doe defendants undercuts the very basis for removal in diversity cases. Diversity jurisdiction under the Constitution and the statutes provides a neutral forum in the event of perceived state court partiality. THE FEDERALIST, No. 80, at 478 (A. Hamilton) (New Am. Library Ed. 1961); S. REP. No. 1830, 85th Cong., 2d Sess., reprinted in [1958] U.S. CODE CONG. & AD. NEWS, 3099, 3102. Plaintiffs may choose the neutral forum when they commence actions, defendants when they remove them. Allowing a state, which a defendant may perceive to be partial, to nevertheless prevent removal defeats the purpose of the legislation. Other state efforts to curtail removal have been rebuffed. *E.g.*, *Harrison v. St. Louis & San Francisco R.R. Co.*, 232 U.S. 318 (1914).

The Court of Appeals erred too in holding that the time for removal must be postponed in accordance with state law. Federal law provides that removal must occur within 30 days of the case's becoming removable, 28 U.S.C. § 1446(b). Under the Ninth Circuit's opinion, however, a

case cannot be removed until the Does have been abandoned or formally dismissed within the strictures of state statutes, which often takes several years after the filing of the action. The legislative history of the removal statutes, combined with the prior decisions of this Court and the recent congressional bill, all demonstrate instead that Congress intended that removal occur early, not late.

Finally, the removal statutes and the decisions of this Court demonstrate that infirmities in removal must be dealt with before judgment. After judgment a different standard applies. The Ninth Circuit, however, applied a pre-judgment standard to a belated post-judgment attempt to add defendants, and on that basis required remand to the state court. But the district court's jurisdiction existed at the time of judgment. Infirmities which had not been raised earlier, and attempts to add parties post-judgment, cannot *ex post facto* invalidate jurisdiction.

ARGUMENT

I.

A RECENT CONGRESSIONAL BILL REQUIRES THAT THIS COURT REVERSE OR VACATE THE DECISION OF THE NINTH CIRCUIT AND REINSTATE THE JUDGMENT OF THE DISTRICT COURT.

Congress recently has passed a bill which, if it becomes law, will answer the questions raised by this action without consideration of further argument. As a result of the new law, this Court should reverse or vacate the opinion of the Court of Appeals, and reinstate the Judgment of the District Court.

On October 19, 1988, Congress passed the Judicial Improvements and Access to Justice Act, H.R. 4807,

100th Cong., 2d Sess., *printed in* 134 Cong. Rec. H 10430 *et seq.* (daily ed. Oct. 19, 1988) ("Judicial Improvements Act"). Title X of that act contains provisions pertinent here, the most important of which says that fictitious defendants do not prevent removal based on diversity of citizenship:

SECTION 1016. IMPROVEMENTS IN REMOVAL PROCEDURE.

(a) ACTIONS REMOVABLE GENERALLY. — Section 1441(a) [of Title 28] is amended by adding at the end thereof the following new sentence: "For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded."

Other provisions of the new law also respond to problems raised by state court Doe pleading. The fear that actions could be removed after years in state court is dealt with by amending the statute to provide a one-year cap on the time when an action may be removed, notwithstanding that the case becomes removable thereafter. *Id.*, § 1016(b)(2)(B). The concern that a plaintiff could allow a case to be fully prosecuted in federal court and then move to remand is dealt with in two ways: (1) by requiring the plaintiff to move to remand within 30 days following removal; and (2) by changing 28 U.S.C. § 1446(c), which previously had required remand if, prior to judgment, it appeared that an action "had been removed improvidently and without jurisdiction," to require remand instead only if, prior to judgment, it appears that the district court "lacks subject matter jurisdiction." *Id.* § 1016(c)(1). A final change provides that a plaintiff may move to add additional defendants following removal and empowers the district court, if it decides joinder otherwise is appropriate, to then remand the action to state court. *Id.*, § 1016(c)(2).

The legislative history makes clear that these statutory provisions address the very problems confronted by the Ninth Circuit in the within case:

Subsection (a) amends 28 U.S.C. 1441(a) to permit the citizenship of fictitious defendants to be disregarded. This amendment addresses a problem that arises in a number of states that permit suits against "Doe" defendants. The primary purpose of naming fictitious defendants is to suspend the running of the statute of limitations. The general rule has been that a joinder of Doe defendants defeats diversity jurisdiction unless their citizenship can be established, or unless they are nominal parties whose citizenship can be disregarded even if known. This rule in turn creates special difficulties in defining the time for removal. Removal becomes possible when the Doe defendants are identified or dropped, perhaps as late as the start of trial, or when it becomes clear that any claims against the Doe defendants are fictitious or merely nominal. At best, the result may be disruptive removal after a case has progressed through several stages in the State court. At worse, [sic] the result may be great uncertainty as to the time when removal becomes possible, premature attempts to remove and litigation over removability, and forfeiture of the removal opportunity by delay after the point that in retrospect seems to have made clear the right to remove. These problems can be avoided by the disregard of fictitious defendants for purposes of removal. Experience in the district courts in California, where Doe defendants are routinely added to state court complaints, suggests that in many cases no effort will be made to substitute real defendants for the Doe defendants, or the newly identified defendants will not destroy diversity. If the plaintiff seeks to substitute a diversity-destroying defendant

after removal, the court can act as appropriate under proposed § 1447(d) to deny joinder, or to permit joinder and remand to the State court.

H.R. REP. No. 100-89, 100th Cong., 2d Sess. 71 (1988); *see also, id.* at 72-73.

The House Report was referenced on the floor of the House when the bill was passed. 134 CONG. REC H 10441 (daily ed. Oct. 19, 1988.) The analysis contained therein, and referenced above, also was made part of the record before the Senate approved the bill. 134 CONG. REC. S. 16308 (daily ed. Oct. 14, 1988.)

With this legislation, Congress unequivocally has determined that Doe pleading does not invalidate removal jurisdiction. When signed, this new legislation on jurisdiction will apply to this case pending before the Court on direct review. *Andrus v. Charlestone Stone Products Co., Inc.*, 436 U.S. 603, 607 n.6 (1978); *United States v. Alabama*, 362 U.S. 605, *reh'g denied*, 363 U.S. 857 (1960); *United States v. Union Gas Co.*, 832 F.2d 1343, 1357 (3d Cir. 1987), *cert. granted*, 108 S.Ct. 1219 (1988); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1082-83 (1st Cir. 1986); *Phillips Petroleum Co. v. United States Environmental Protection Agency*, 803 F.2d 545, 551 (10th Cir. 1986); *Rubin v. Belo Broadcasting Corp.*, 769 F.2d 611, 614 (9th Cir. 1985); *Carlton v. BAWW, Inc.*, 751 F.2d 781, 787 n.6 (5th Cir. 1985).

The requirement that the Court apply the jurisdictional statutes in force at the time of decision grows from venerable authority. Chief Justice Marshall first announced the general rule that "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied ... [T]he court must decide according to existing laws

..." *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). Since then, this Court has reaffirmed that when legislative changes occur while a case is pending on direct review a court shall "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711 (1974); accord, *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 281-82 (1969).

By the time of decision here, the law if signed emphatically will provide that (1) the existence of Doe defendants does not deprive the district court of subject matter jurisdiction in cases removed based on diversity of citizenship; (2) challenges to the procedures for removal must be made within 30 days of removal; and (3) that the district court shall remand only if it appears before judgment that subject matter jurisdiction is lacking. The Ninth Circuit's opinion conflicts with each of these points. Now, without doubt, it is clear that the Court of Appeals' decision does not correctly state the law, that it should be reversed or vacated, and that the judgment of the district court should be reinstated.

II.

IN ANY EVENT, THE CALIFORNIA DOE DEFENDANT PLEADING PRACTICE CANNOT DEPRIVE THE FEDERAL COURTS OF REMOVAL JURISDICTION.

A. The Court Must Apply Federal, Not State Law

The recent congressional declaration that fictitiously named defendants are to be disregarded for removal purposes reinforces the decisions of this Court and is consistent with the statutes even before they were supple-

mented. Since the Judiciary Act of 1789, 1 Stat. 79 (1789), Congress has provided that a case commenced in state court could be removed to federal court if the federal court had subject matter jurisdiction. The question always has been whether the federal court had subject matter jurisdiction. That is a question of federal law. *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 705 (1972). Moreover, federal jurisdiction is to be tested on the facts which exist at the time an action is removed. See *Barney v. Latham*, 103 U.S. 205 (1881).

The decisions of this Court also demonstrate that in conflicts between federal and state practices, federal law governs. Most recently, in *Stewart Organization, Inc. v. Ricoh Corporation*, 108 S.Ct. 2239 (1988), the Court held that the determination of venue in a diversity action must be made according to federal law. There, the parties had included a choice of forum clause in their contract, but the district court, confronted with a motion to transfer under 28 U.S.C. § 1404(a), applied Alabama law which refused to enforce choice of forum clauses. This Court held that instead the motion to transfer must be evaluated under federal law. Ruling that both Congress and the State of Alabama had legislated on the same issue — venue — the Court held that federal law governed:

The premise of the dispute between the parties is that Alabama law may refuse to enforce forum-selection clauses providing for out-of-state venues as a matter of state public policy. If that is so, the District Court will have either to integrate the factor of the forum-selection clause into its weighing of considerations as prescribed by Congress, or else to apply, as it did in this case, Alabama's categorical policy disfavoring forum-selection clauses. Our cases make clear that, as between these two choices in a single "field of operation," *Burlington Northern R. Co.*

v. Woods, 480 U.S. at —, the instructions of Congress are supreme.

Id. at 2244. (footnote omitted.) See also *Burlington Northern R. Co. v. Woods*, 480 U.S. 1 (1987) (in diversity action, federal rule was to be applied over contrary state rule concerning actions on appeal).

These decisions establish that in diversity actions, where federal and state laws cover the same subject, federal laws reign supreme. *A fortiori* that conclusion applies to questions as to the existence of diversity jurisdiction, which by definition is a creation of Congress. Accordingly, the circuits which have considered the question uniformly have ruled that the determination of citizenship for diversity purposes is controlled by federal law. *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974); *Stifel v. Hopkins*, 477 F.2d 1116, 1120 (6th Cir. 1973); *Ziady v. Curley*, 396 F.2d 873, 874 (4th Cir. 1968); *City of Minneapolis v. Reum*, 56 F. 576, 581 (8th Cir. 1893). As this Court has said in other removal contexts, “the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts.” *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 104 (1941).

B. As Interpreted By The Court Of Appeals, The California Doe Practice Conflicts With Federal Law

When a case otherwise is appropriate for removal based on diversity of citizenship, the California Doe pleading practice as interpreted by the Ninth Circuit conflicts with federal law. The California practice is found in California Code of Civil Procedure Section 474 which provides in part:

When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint . . . and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly. . . .

CAL. CIV. PROC. CODE § 474 (West 1983).

As construed by California courts, this provision applies not only to ignorance of a defendant's name, however. It also applies to non-existent defendants. Thus, a plaintiff can sue a Doe but not charge him with any actionable conduct, *see, e.g., Barnes v. Wilson*, 40 Cal.App.3d 199, 205, 114 Cal.Rptr. 839, 844 (1944), and prior to suing, a plaintiff is not required to exercise reasonable diligence to discover either a Doe's identity or facts giving rise to a cause of action against a Doe. *Munoz v. Purdy*, 91 Cal.App.3d 942, 947-48, 154 Cal.Rptr. 472 (1979). As used here, therefore, John or Jane Doe is not an alias, as in *Roe v. Wade*, 410 U.S. 113 (1973) or *Doe v. Bolton*, 410 U.S. 179 (1973). It is a fiction. Prior to the Court of Appeals' opinion herein, certain Ninth Circuit decisions had branded such Does as phantoms, condemned such Doe allegations as sham, and disregarded such Does for purposes of removal based on diversity, at least where the defendant's verified petition showed them to be sham. *See, e.g., Grigg v. Southern Pacific Co.*, 246 F.2d 613 (9th Cir. 1957); *Chism v. National Heritage Life Insurance Co.*, 637 F.2d 1328 (9th Cir. 1981).

The reason that plaintiffs in state court plead Doe defendants is that plaintiffs thereby toll the statute of limitations should they later wish to add a defendant. Under California Code of Civil Procedure Section 583.210 (formerly § 581a(a)), a plaintiff has three years within which to serve any defendant — including a Doe who, at the time the Complaint was filed, was neither known nor

described nor alleged to have done anything, except in some unspecified way to have been liable for plaintiff's injury. A one-year statute of limitations for tort, CAL. CIV. PROC. CODE § 339, therefore effectively becomes four years; a four-year statute of limitations for breach of contract, Cal. Civ. Proc. Code § 337, effectively becomes seven years. If a real party *should* be named within that time period and, by amendment, take the place of a Doe, the amendment relates back to the date the Complaint originally was filed. *Clark v. Stabond Corp.*, 197 Cal.App.3d 50, 56, 242 Cal.Rptr. 676, 679 (1987).

Accordingly, in California it is universal practice for plaintiffs in state court to name large numbers of Does (here, 50 Does) and, by rote incantation, to allege merely that the names, capacities and actions of the Does are unknown, but the Does are implicated somehow, and that all defendants were agents of the others. Treatises and form books on California law regularly advise counsel to plead such Doe allegations. *See, e.g.*, R. WEIL & I. BROWN, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL § 6:58.1 at 6-10 (1985); WEST'S CALIFORNIA CODE FORMS, CIVIL PROCEDURE, § 474 at 475 (1981). Official form complaints prescribed by the California Judicial Commission contain pre-printed Doe allegations. *See, e.g.*, 10C CALIFORNIA FORMS OF PLEADINGS AND PRACTICE, at 83 (1988) (example of printed form tort complaint.) As one commentator has noted, "California counsel have no alternative but to recite the fictitious defendant ritual in each and every complaint." Hogan, *California's Unique Doe Defendant Practice: A Fiction Stranger than Truth*, 30 STAN. L. REV. 51, 103-104 (1977).

The California Doe practice implicates two concepts: joinder of defendants and relation-back of an amendment to the date of the original complaint. Neither subject,

however, addresses *who* is a defendant at the time the action is commenced. By their very nature they admit that there are no such real defendants at the time the action is commenced. Rather, both subjects address how a court proceeds when a plaintiff subsequently desires to add a defendant.

The Federal Rules of Civil Procedure also address both subjects. Rules 19-21 define joinder of defendants, and Rule 15(c) covers the relation back of an amendment to the date of the original complaint. These rules clearly govern actions *commenced* in federal court, even when diversity of citizenship forms the basis for federal jurisdiction. To say that diversity actions *removed* from state court are governed by state rules on joinder and relation-back, such that the state rules determine whether federal jurisdiction exists in the first place, is backwards: it gives the states authority to determine federal jurisdiction. Such a notion conflicts with the decisions of this Court, and guts the rationale of removal in a diversity action.

For example, this Court long ago held that the presence of formal or unnecessary parties did not defeat removability. In *Salem Trust Co. v. Manufacturers' Finance Co.*, 264 U.S. 182 (1924) the defendant trust company, a stakeholder between two competing claimants, was not of diverse citizenship with the plaintiff. Nevertheless, since the company was not necessary for an adjudication of the dispute between the claimants, the company's presence did not destroy diversity and require remand to state court. If the trust company, an actual entity already present did not destroy diversity, then a Doe defendant who does not exist at all at the time of removal cannot destroy diversity.

This Court also has firmly held that removal cannot be prevented by the fraudulent or wrongful joinder of non-diverse parties. *See, e.g., Pullman Co. v. Jenkins*, 305 U.S.

534, 541 (1939); *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *Chesapeake & Ohio R.R. Co. v. Cockrell*, 232 U.S. 146, 152 (1914) (“[T]his right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy”); *Chicago, Rock Island and Pacific Railway Co. v. Schwyhart*, 227 U.S. 184, 194 (1913); *Illinois Central R.R. Co. v. Sheegog*, 215 U.S. 308, 316 (1909) (“[I]f it appears that the joinder was fraudulent, as alleged, it will not be allowed to prevent the removal”); *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176, 185 (1907); *Alabama Great Southern Ry. Co. v. Thompson*, 200 U.S. 206, 217-18 (1906); *Louisville & N. R. Co. v. Wangelin*, 132 U.S. 599, 601-02 (1890).

As the Court ruled in *Wilson*, *supra*:

[The] right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. [Citation omitted]. If in such a case a resident defendant is joined, the joinder, although fair upon its face, may be shown by a petition for removal to be only a sham or fraudulent device to prevent a removal. . . .

Wilson, *supra*, 257 U.S. at 97.

Wilson’s definition of fraudulent joinder — parties joined “without any reasonable basis in fact and without any purpose to prosecute the case in good faith,” *id.* at 98 — exactly describes Does at the time of removal. At that time, there is no “reasonable basis in fact” to prosecute the action against them, because there are no facts against them at all — they do not exist.

Moreover, federal law rejects the notion of a an unnamed, unidentified, non-existent Doe. For example, the federal rules on prosecuting actions in the name of the real party in interest forbid the naming of Does on the

mere possibility that some unidentified claim exists on behalf of some unknown party. FED.R.CIV.P. 17(a). Thus when Rule 17 was amended in 1966, the Advisory Committee wrote:

The provision [that no action shall be dismissed on the ground of non-prosecution in a real party's name until reasonable time has elapsed] should not be misunderstood or distorted. . . . It does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real victim, and have the benefit of the suspension of the limitation period.

Advisory Committee Notes to 1966 Amendment to FED.R.CIV.P. 17. It would be anomalous for federal law to forbid suit in the name of a fictitious party, but to countenance suit against a similarly unknown party, especially for some unknown, unidentified act. Federal law indeed does not create such an anomaly. Federal Rule of Civil Procedure 11 defines a counsel's signature on a Complaint as his certificate that the complaint is "well grounded in fact" and that this conviction was "formed after reasonable inquiry." A Complaint which contains no factual allegations against a defendant cannot be well grounded in fact; a plaintiff who merely alleges that a defendant is somehow responsible for injury has not made his charge after reasonable inquiry. Moreover, the most venerable of authorities clearly contemplates that defendants be real entities. One cannot read the evaluation of "alien," "citizen" and "party" in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1807) without concluding that in

requiring complete diversity, Chief Justice Marshall was writing of real, not fictitious parties.

The California Doe practice thus inalterably conflicts with federal law. The Ninth Circuit resolved the conflict by deferring to California law. This resolution stands jurisdiction on its head. Removal based on diversity becomes meaningless if a state court can prevent it.

C. Allowing California Law To Govern Over Federal Law, As Does The Decision of the Court Of Appeals, Eviscerates Removal Based On Diversity

The rationale underlying federal diversity jurisdiction explains why a state statute cannot operate to prevent removal. Authorized by the Constitution, U.S. CONST. art. III, § 2, and implemented by statute, diversity jurisdiction represents the judgment of Congress that the federal courts can provide a neutral forum in disputes between parties from different states. From the beginning, diversity jurisdiction has protected against the perception of partiality a state court might show to its home litigants.

In his advocacy of the Constitution, Alexander Hamilton defended diversity jurisdiction on those terms:

[I]n order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens and which, owing its official existence to the Union, will never be likely

to feel any bias inauspicious to the principles on which it is founded.

THE FEDERALIST, No. 80, at 478 (A. Hamilton) (New Am. Library Ed. 1961). Legislation implementing the principle Hamilton so strongly advanced always has existed. *E.g.*, 1 Stat. 79 (1789); 14 Stat. 558 (1867); 18 Stat. 470 (1875); 25 Stat. 433 (1888); 36 Stat. 1091-95 (1911); 28 U.S.C. § 1332 (1958).

Congress subsequently has authorized diversity jurisdiction on the same basis as Hamilton in THE FEDERALIST. When the jurisdiction provisions were amended in 1958, for example, the Senate Report explicitly stated:

The underlying purpose of diversity of citizenship legislation (which incidentally goes back to the beginning of the Federal judicial system, having been established by the Judiciary Act of 1789) is to provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the federal courts.

S. REP. NO. 1830, 85th Cong., 2d Sess., *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS, 3099, 3102.

Removal gives a defendant the option of transferring his case to federal court if he perceives the need for the neutral federal forum. The fact that in diversity actions he cannot remove if the action is pending in his *own* state, 28 U.S.C. § 1446(b), helps demonstrate that the very purpose is to protect against a perceived disadvantage by being forced to defend in his opponent's state court. In short, removal gives him the protection of a federal forum where there is federal jurisdiction.

It would be anomalous to allow a state pleading practice to keep the defendant in state court and prevent him from removing the action to federal court. The very

protection Congress has provided — a neutral forum in the event of perceived partiality — would be eliminated by the state which was perceived to have been partial in the first place. Congress cannot have meant to provide a right of removal from a state court only to empower a state to take the right away.

To the contrary, in numerous contexts this Court has ruled that a state cannot legislate in a way which deprives a litigant of his right to remove. In *Harrison v. St. Louis & San Francisco R.R. Co.*, 232 U.S. 318 (1914), this Court ruled that a state could not revoke a corporation's business license to prevent the corporation from asserting its right to remove an action. Nor may a state, by requiring a corporation to be licensed in that state, change the citizenship of the corporation so that diversity jurisdiction is defeated. *Southern Railway Co. v. Allison*, 190 U.S. 326 (1903); *Missouri Pacific Railway v. Castle*, 224 U.S. 451 (1912). In *Chicago & Northwestern Railway Co. v. Whitton*, 80 U.S. (13 Wall.) 270 (1872) this Court ruled that a state statute requiring that an action be brought in a state court could not defeat the right to remove. As Professor Moore notes, "[s]ince removal must rest upon a valid federal statute, a state cannot place restrictions upon the right to remove." 1A J. MOORE & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 0.157[2] at 47 (2d ed. 1987).

Like the situation presented by these decisions, the California Doe pleading practice cannot restrict removal. Nor can it delay the time for removal, for Congress has determined that cases be removed as early as possible.

III.

CONTRARY TO THE RULING OF THE COURT OF APPEALS, THE REMOVAL STATUTES CONTEMPLATE REMOVAL AT THE EARLIEST POSSIBLE TIME.

At the time of decision by the Court of Appeals, 28 U.S.C. § 1446(b) provided in pertinent part:

The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

With the passage of the Judicial Improvements Act, the statute will be supplemented to cap the period when an action may be removed. If an action is not removable initially, it still may become removable but only if the facts making it so appear within one year after commencement of the action. *Id.* § 1016(b)(2)(B). The thirty-day requirement for removal, however, remains the same.

With one exception, this provision for early removal has characterized removal legislation since its inception. In the Judiciary Act of 1789, for example, removal was authorized at the time the defendant made his appearance in state court. 1 Stat. 79 (1789). In modern legislation the time for removal has been as short as twenty days follow-

ing commencement of the action, 63 Stat. 89 (1949), and since 1965 has remained at 30 days.

The one exception to the history of prompt removal came during the Reconstruction Era. At a time when actions of state courts were particularly suspect, and when the removal statutes permitted removal upon the affidavit of either plaintiff or defendant that he believed that he could not receive a fair state court trial because of local prejudice, a party could remove at any time prior to trial. As Reconstruction neared its end, however, Congress amended the statute, reverting to the earlier practice of requiring earlier removal. 18 Stat. 470 (1875). The amendment passed following debate in which the lengthy delay before removal was characterized by the author of the new bill as "mischievous in its consequences." 2 CONG. REC. 4,302 (1874). Subsequently this Court construed the 1875 law as "manifest[ing] the intention of Congress that the petition for removal should be denied at the earliest possible opportunity." *Powers v. Chesapeake & Ohio Railway*, 169 U.S. 92, 100 (1898).

The Court of Appeals' opinion here, however, insures removal at a late stage of the litigation, guaranteeing the very "mischievous consequences" Congress rejected. Since under California law service of process on a Doe may be made as much as three years after the action begins, CAL. CIV. PROC. CODE § 583.210 (formerly § 581(a)), the 30 days within which Congress requires removal, 28 U.S.C. § 1446(b), has to be postponed that long — or perhaps longer. The Ninth Circuit rule prohibits removal unless the plaintiff drops the Doe defendants or trial commences without service of the Does. *Bryant*, 844 F.2d at 606 n.5. Thus, the three year period for service could expire, the Does could remain in the Complaint but trial nevertheless might not occur until sometime later — and the case still would not be removable

until the trial commences. This is not mere conjecture; the time to trial in Los Angeles Superior Court, for example (the court from which the within action was removed) often is longer than three years. *See, e.g.,* Judicial Council of California, 1988 ANNUAL REPORT at 103.

Even if the presence of Does could prevent removal based on the Complaint, the Ninth Circuit's rule that removability is foreclosed entirely until the Does are named, dismissed or voluntarily abandoned cannot be reconciled with the statutes. The statutes do not limit removal to cases where parties are dropped or trial has commenced. Rather, they authorize removal at any time within 30 days of receipt of "an amended pleading, motion, order or other paper" disclosing that a case has become removable. 28 U.S.C. § 1446(b). This Congressional language covers a variety of circumstances, ranging from answers to interrogatories or requests to admit to letters to papers filed in state court. Numerous cases show that diversity can be uncovered under just such circumstances. *Barngrover v. M.V. Tunisian Reefer*, 535 F.Supp. 1309 (C.D. Cal. 1982); *Miller v. Stauffer Chemical Co.*, 577 F.Supp. 775 (D. Kan. 1981); *Lee v. Altamil Corp.*, 457 F.Supp. 979 (M.D. Fla. 1978); *Camden Industries Co. v. Carpenters Local Union, etc.*, 246 F.Supp. 252 (D. N.H.), *aff'd*, 353 F.2d 178 (1st Cir. 1965); *Fisher v. United Airlines, Inc.*, 218 F.Supp. 223 (S.D.N.Y. 1963). Under the Ninth Circuit's rule, all these must be disregarded. The statute makes clear that Congress intended otherwise.

The provision for removability as disclosed by "other papers" was added to the statute in 1949, and recognizes that there must be an exception to early removal when facts discovered after the action has been commenced may make the action removable. The legislative history discloses that the amendment was declaratory of existing

law. H.R.REP. No. 352, 81st Cong., 1st Sess. (1949), *reprinted in* [1949] U.S. CODE CONG. SERV. 1254, 1268. Even when these exceptions arise, however, removal must occur quickly — within 30 days — or not at all. The Ninth Circuit rule wrongly added its own language to the statute, by using “abandonment” and “dismissal” of the Does in place of the language Congress enacted.

IV.

CONTRARY TO THE RULING OF THE COURT OF APPEALS, A DIFFERENT STANDARD APPLIES FOR APPELLATE REVIEW OF A JUDGMENT THAN FOR DISTRICT COURT DECISION ON A MOTION TO REMAND.

The Ninth Circuit’s decision also conflicts with the statutes and decisions of this Court because it applies the same rule both before and after judgment. The statutes and decisions of this Court, however, establish different standards before and after judgment. Prior to the recent Congressional bill, 28 U.S.C. § 1447(c) provided that “*if at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case.*” (Emphasis added). Following amendment the statute will provide that the case shall be remanded “if at any time before final judgment it appears that the district court lacks subject matter jurisdiction.” Judicial Improvements Act, § 1016(c) (1). With or without amendment, the statute clearly differentiates between the status of a case before and after judgment. It is only *before* judgment that remand must occur.

Following judgment, the question is not whether jurisdiction existed at the time of removal, but whether it existed at the time of judgment. In *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972), this Court held

that regardless of whether a case has been properly removed, if judgment has been rendered, and if the district court had diversity jurisdiction as between the parties governed by the judgment, the fact that there were other parties with other claims did not defeat the jurisdiction of the district court to enter judgment. *Grubbs* held that "[w]hile of course Texas is free to establish such rules of practice for her own courts as she chooses," the language of Congress was paramount, and that Congress intended that the removal statutes should be applied uniformly nationwide. *Id.* at 705.

In determining that appellate review should focus on the status of the case as of the time of judgment, one of the telling points in *Grubbs* was that the plaintiff had made no attempt to remand the case or otherwise challenge the district court's jurisdiction. *Id.* at 701. Thus, whereas the impropriety of removal might have been raised before judgment, it could not be raised following judgment. The failure to object to removal or move for remand has been a telling point in earlier decisions of this Court as well. *See, e.g., Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97-98 (1921).

Under these authorities, even if the existence of Does should have prevented removal, the subsequent conduct of a case can demonstrate that, as of the time of judgment, diversity jurisdiction nevertheless existed. Here, for example, the verified petition alleging the Does were sham went unanswered. Bryant served no parties other than Ford within 120 days, as provided in Federal Rule of Civil Procedure 4(j), notwithstanding that the federal rules govern in removed actions. Fed. R. Civ. P. 81(c). The district court entered judgment without considering the Does. The district court made explicit, in denying Bryant's motions for relief under Federal Rule of Civil Procedure 60(b), that it did *not* consider the Does to be

real parties, and that there was no excuse for plaintiffs not having moved for joinder prior to judgment. The district court emphasized that Bryant had not objected to removal or moved for remand. It is true that the court did not enter a formal order dismissing the Does, but it did clearly disregard them for the purposes of entering judgment. It is inconsistent with *Grubbs* and *Wilson* to hold that despite all this, the mere absence of a formal order dismissing the Does meant that jurisdiction did not exist at the time of judgment.

The effect of the Court of Appeals' ruling is that a post-judgment motion to add parties, which was the only time Bryant sought to add parties, vitiates a judgment. That decision is at odds with the authority vested in the district court by Federal Rule of Civil Procedure 60(b) to evaluate post-judgment motions for relief, and the *Grubbs* holding of finality based on jurisdiction as of the time of the judgment.

V.

THE REMOVAL STATUTES DO NOT ALLOW REMAND FOR THE PURPOSE OF ADMINISTRATIVE EASE.

The theme underlying the Ninth Circuit's bright-line rule is one which has been rejected by this Court: administrative convenience. The Ninth Circuit crafted a rule because of perceived confusion caused by its earlier decisions. It adopted the rule that would be most convenient to apply. The question, however, is whether federal jurisdiction exists; administrative ease is not a proper basis for decisions on removal and remand. *Thermtrom Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). The one point on which the majority and dissent in *Thermtrom* agree is that the contours of removal and remand are set by Congress. Those contours cannot be changed by a

court's desire to fashion its own rules. *See, e.g., United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965) (although union, an unincorporated association had many of the attributes of a corporation, Congress had not defined its citizenship the same and thus it was not to be treated the same).

On numerous occasions, and as recently as the latest term, Congress has considered legislative changes to the statutes which would abolish diversity of citizenship jurisdiction. *See* H.R. 9622, 95th Cong. (1978); H.R. 2202, 96th Cong. (1979); H.R. 6816, 97th Cong. (1982); H.R. 3152, 100th Cong. (1987). These proposals cover removal, too. None of these proposals has become law. Administrative ease cannot justify effecting changes in those very rules which Congress itself so far has been unwilling to modify.

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed or vacated, and the judgment of the district court reinstated.

Dated: November 17, 1988

Respectfully submitted,

HOWARD J. PRIVETT

Counsel of Record

RICHARD A. GOETTE

RALPH ZAREFSKY

MCCUTCHEN, BLACK, VERLEGER & SHEA

600 Wilshire Boulevard

Los Angeles, California 90017

(213) 624-2400

Counsel for Petitioner



**APPENDIX A
STATUTES INVOLVED**

28 U.S.C. § 1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between —

(1) citizens of different States; . . .

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . .

28 U.S.C. § 1441

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim of right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed

and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction . . .

28 U.S.C. § 1446

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable. . . .

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be deter-

mined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition for the removal of the civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded . . .

28 U.S.C. § 1447

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

CAL. CIV. PROC. CODE § 474

When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly; provided, that no default or default judgment shall be entered against a defendant so designated, unless it appears that the copy of the summons or other process, or, if there be no summons or process, the copy of the first pleading or notice served upon such defendant bore on the face thereof a notice stating in substance: "To the person served: You are hereby served in the within action (or proceedings) as (or on behalf of) the person sued under the fictitious name of (designating it)." The certificate or affidavit of service must state the fictitious name under which such defendant was served and the fact that notice of identity was given by endorsement upon the document served as required by this section. The foregoing requirements for entry of a default or default judgment shall be applicable only as to fictitious names designated pursuant to this section and not in the event the plaintiff has sued the defendant by an erroneous name and shall not be applicable to entry of a default or default judgment based upon service, in the manner otherwise provided by law, of an amended pleading, process or notice designating defendant by his true name.

CAL. CIV. PROC. CODE § 583.210 (West, 1988) (formerly § 581a(a))

(a) The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this

subdivision an action is commenced at the time the Complaint is filed.

(b) Return of summons or other proof of service shall be made within 60 days after the time the summons and complaint must be served upon a defendant.

APPENDIX B
JUDICIAL IMPROVEMENTS AND ACCESS TO
JUSTICE ACT (1988)

**SEC. 1016. IMPROVEMENTS IN REMOVAL
PROCEDURE.**

(a) **ACTIONS REMOVABLE GENERALLY.** — Section 1441(a) is amended by adding at the end thereof the following new sentence: “For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded”.

(b) **PROCEDURE FOR REMOVAL.** — Section 1446 is amended —

(1) by amending subsection (a) to read as follows:

“(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action”;

(2) in subsection (b) —

(A) by striking out “petition for removal” each place it appears and inserting in lieu thereof “notice of removal”; and

(B) in the second paragraph by striking out the period at the end thereof and inserting in lieu thereof “, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action”; and

(3) by striking out subsection (d) and redesignating subsections (e) and (f) as subsection (d) and (e), respectively.

(c) PROCEDURE AFTER REMOVAL GENERALLY. — Section 1447 is amended —

(1) by amending subsection (c) to read as follows:

“(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case”; and

(2) by adding at the end thereof the following new subsection:

“(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.”

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 17, 1988, I served the within Brief for Petitioner in re: "Ford Motor Company v. Gary Bryant" in the United States Supreme Court, October Term 1988, No. 88-97 and Joint Appendix Filed Under Separate Cover Thereto;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

MICHAEL L. GOLDBERG

Counsel of Record

CHARLES B. O'REILLY

TIMOTHY JOHN WHEELER

GREEN, O'REILLY, BROILLET,

PAUL, SIMON & WHEELER

1000 Connecticut Avenue, N.W.
Suite 1205

Washington, D.C. 20036

ROBERT D. RAVEN*

President,

American Bar Association

BRUCE A. GREEN

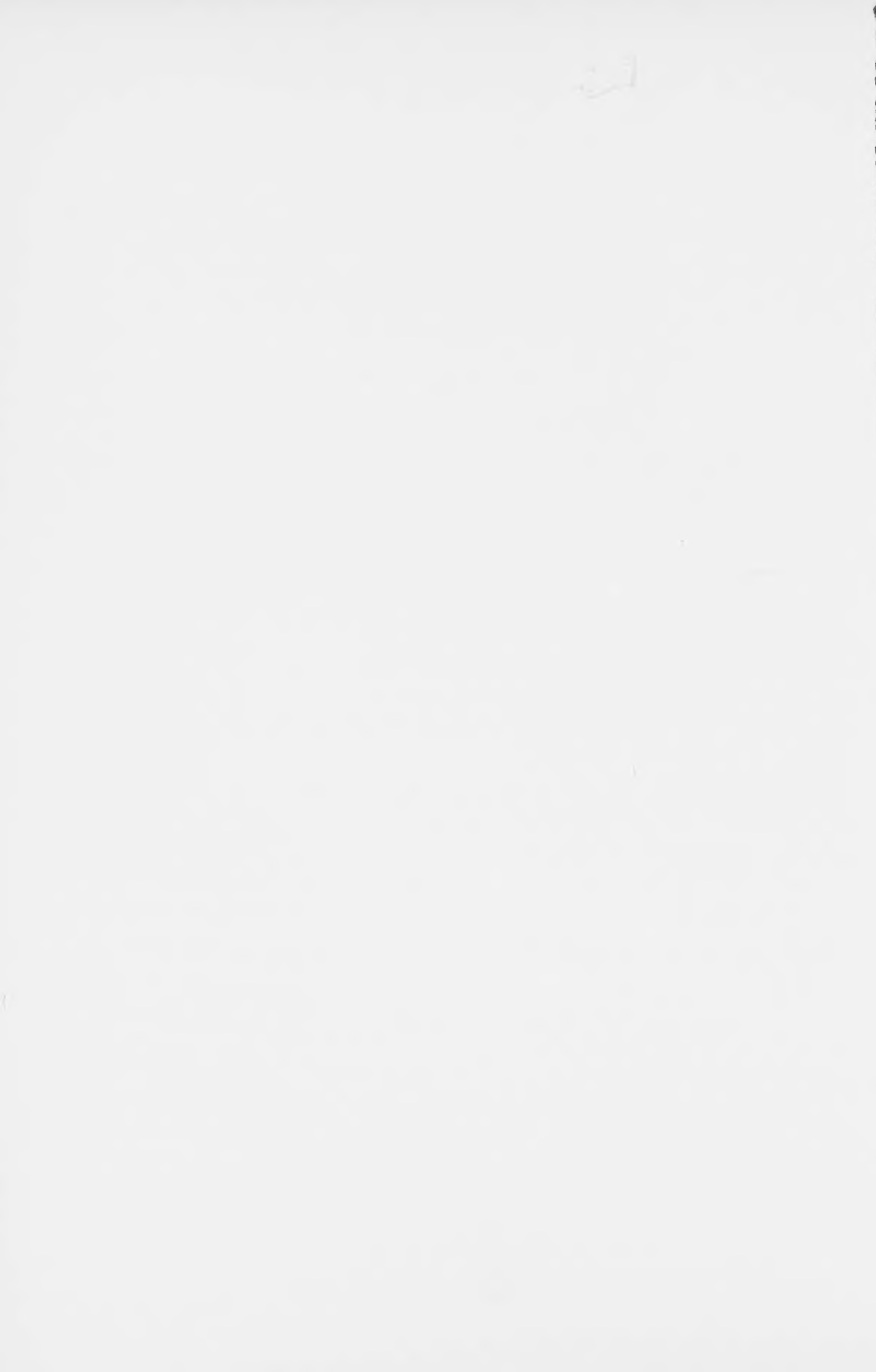
MARC M. ARKIN

GREGORY D. HUFFAKER, JR.

750 N. Lake Shore Dr.
Chicago, Illinois 60611

* Counsel of Record

All Parties required to be served have been served.



I certify under penalty of perjury, that the foregoing is true and correct.

Executed on November 17, 1988, at Los Angeles, California


CE CE MEDINA

(6)
No. 88-97

Supreme Court, U.S.

FILED

NOV 17 1988

JOSEPH E. SPANIOLO, JR.

CLERK

In The
Supreme Court of the United States
October Term, 1988

— o —
FORD MOTOR COMPANY,

Petitioner,

v.

GARY BRYANT,

Respondent.

— o —
On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

— o —
JOINT APPENDIX

— o —
Howard J. Privett
Counsel of Record
Richard A. Goette
Ralph Zarefsky
McCutchen, Black, Verleger
& Shea
600 Wilshire Boulevard
Los Angeles, CA 90017
(213) 624-2400
Counsel for Petitioner

Michael L. Goldberg
Counsel of Record
Charles B. O'Reilly
Timothy John Wheeler
Greene, O'Reilly, Broillet,
Paul, Simon & Wheeler
1000 Connecticut Avenue, N.W.
Suite 1205
Washington, D.C. 20036
(202) 293-0172
Counsel for Respondent

— o —
Petition for Certiorari filed July 14, 1988
Certiorari granted October 3, 1988

TABLE OF CONTENTS

Page

Docket Entries in the United States District Court for the Central District of California	1
Summons and Complaint for Damages (Personal Injuries) filed January 27, 1984	4
Petition for Removal of Civil Action; Memorandum of Points and Authorities in Support Thereof; and Verification filed March 29, 1984	15
Answer of Defendant Ford Motor Company to Complaint for Damages filed April 3, 1984	25
Notice of Motion and Motion for Summary Judgment and Summary Adjudication of Issues filed July 9, 1984	32
Memorandum of Points and Authorities in Support of Motion for Summary Judgment and for Summary Adjudication of Issues filed July 9, 1984	34
Appendix of Exhibits in Support of Motion for Summary Judgment and for Adjudication of Issues filed July 9, 1984	55
Statement of Uncontroverted Facts and Conclusions of Law lodged July 9, 1984	85
Statement of Genuine Issues Pursuant to U.S. District Court Rule 7.14.2 filed August 7, 1984	88
Plaintiff's Opposition to Motion for Summary Judgment: Memorandum of Points and Authorities in Support Thereof; Declaration of Timothy J. Wheeler filed August 10, 1984	91
Reply Memorandum of Ford Motor Company in Support of Motion for Summary Judgment and Summary Adjudication of Issues filed August 15, 1984	111
Notice of Taking Deposition (Records Only, No Appearance Necessary) of Custodian of Records of City Ford Company with attached Deposition Subpoena and Declaration of Timothy J. Wheeler filed August 17, 1984	120

TABLE OF CONTENTS—Continued

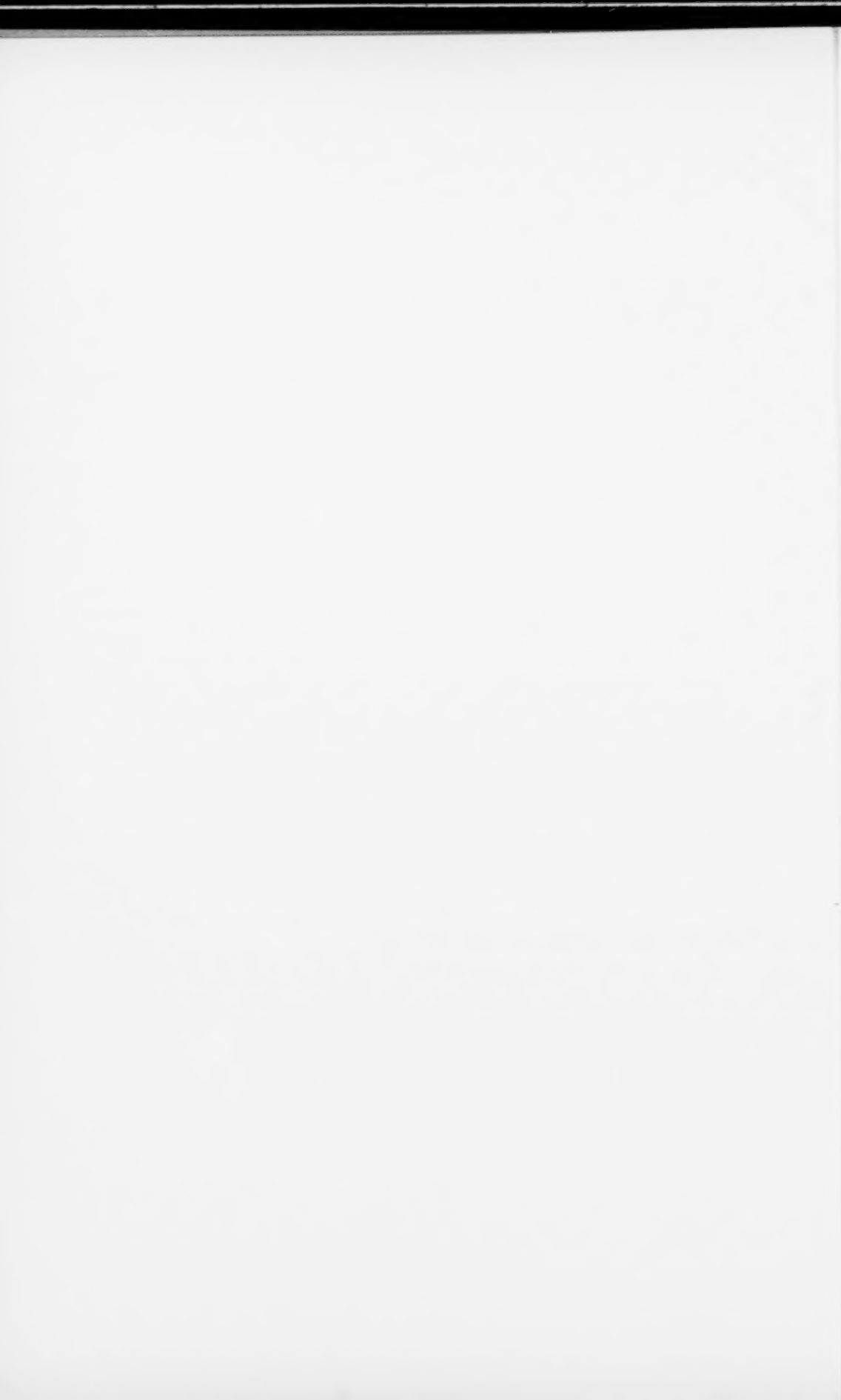
	Page
Reporter's Transcript of Proceedings Before the District Court on August 20, 1984	125
U.S. District Court Civil Minutes and Tentative Ruling filed August 20, 1984	130
U.S. District Court Order filed August 23, 1984, granting defendant's motion for summary adjudication of issues	135
Notice of Motion and Motion to Remand to Superior Court; Memorandum of Points and Authorities; Declaration of Timothy J. Wheeler filed August 29, 1984	137
Notice of Motion and Motion 1. To Join Additional Parties Pursuant to Rule 20 of the Federal Rules on Civil Procedure; and 2. For Leave to File First Amended Complaint or in the Alternative to Remand This Action to the Proper State Court; Memorandum of Points and Authorities; Declaration of Timothy J. Wheeler filed August 29, 1984	144
Notice of Appeal filed September 26, 1984	153
U.S. District Court Civil Minutes filed September 28, 1984, stating Court has no jurisdiction over the action except pursuant to FRCP 60(b), no action will be taken on instant motion [Motion to Remand]	155
Notice of Motion and Motion for Relief from Judgment of Order (F.R.C.P. § 60(b)) or in the Alternative, A Motion for Reconsideration: Local Rule 7.16 filed October 4, 1984	156
U.S. District Court Order filed November 8, 1984, stating appeal for 30 days	172
U.S. District Court Order filed November 21, 1984, denying plaintiff's motion to reconsider and motion to set aside judgment	173
Reporter's Transcript of Proceedings Before District Court on December 20, 1984	176

TABLE OF CONTENTS—Continued

	Page
Notice of Motion and Motion for Limited Remand filed January 11, 1985	187
Supplemental Declaration of Timothy J. Wheeler filed January 11, 1985	201
U.S. Court of Appeals for the Ninth Circuit Order filed January 22, 1985, denying motion to vacate without prejudice to renewal, if necessary, following the remand	212
U.S. District Court Civil Minutes filed January 22, 1985, denying motion to reconsider	213
Opposition of Defendant-Appellee Ford Motor Company to Motion for Limited Remand and Motion to Vacate; Declaration of Richard A. Goette filed January 22, 1985	214
Supplemental Declaration of Richard A. Goette in Opposition to Motion for Limited Remand and Motion to Vacate filed January 25, 1985	232
Notice of Remand, Declaration of Timothy J. Wheeler filed January 28, 1985	234
U.S. District Court Civil Minutes filed February 8, 1985, denying motion to reconsider	235
Notice of Appeal filed March 1, 1985	236
U.S. Court of Appeals for the Ninth Circuit Order filed May 3, 1985, consolidating appeals	238
<i>Bryant v. Ford Motor Co.</i> , 794 F.2d 450 (1986)	239

The following opinion, judgment, and statutes have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Amended Opinion of the Ninth Circuit Court of Appeals	A-1
District Court's Summary Judgment	B-1
Pertinent Statutes Involved	C-1



CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

Docket Entries as filed in the United States Court Central
District of California

CV84-2049 PAR(MCX) *Gary Bryant vs. Ford Motor Co.*

<u>DATE</u>	<u>PROCEEDINGS</u>
1/24/84	Summons and Complaint for Damages (Personal Injuries) filed in Superior Court of the State of California for the County of Los Angeles Case No. C483981
3/29/84	PETN FOR REMOVAL frm Sup Crt. Co of LA Case #C483981, w/epy sms & complt.
4/ 3/84	ANSWER to COMPLAINT deft Ford Motor Co.
7/ 9/84	Note of mot for S/J & Summary adjudicatn of Issues, 8/20/84, 10 a.m. Deft LODGED prop statmnt of uncontrvted facts/ conclus of law. Memo of P's/A's in suppt of mot for S/J & for Summry adjudicatn of issues, 8/20/84, 10 a.m. Deft. Appendix of exhbts in suppt of mot for S/J & for adjudictn of issues, 8/20/84, 10 a.m. Deft.
8/ 7/84	Stmnt of genuine issues Pltf
8/10/84	Pltf oppostn to mot for S/J; memo of P's/A's; declr of Timothy J. Wheeler, 8/20/84, 10 a.m. Pltf.
8/15/84	Reply memo of Ford Motor Co, in suppt of mot for S/J, & Summary adjudictn of Issues, Deft.
8/17/84	Note of taking depo (records only, no apprnce) of custodian of recrds of City Ford., 9/12/84, 10 a.m. Pltf.

<u>DATE</u>	<u>PROCEEDINGS</u>
8/20/84	MO [Minute Order]: Defts mot for S/J & summary adjudictn of issues is GRANTED re
8/23/84	Fld Judgmnt & ORD that pltfs negligenc claim as alleged in first cause of actn in complnt sh be dismiss as mat of law. pltfs beach of warranty claim as alleged in second cause of actn in complnt sh be dismiss as a mat of law. pltfs strict liability claim as alleged in third cause of actn in complnt sh be dismiss as mat of law. Ford is entitled to summary adjudictn of issues & disml of 1st, 2nd & 3rd causes of actn. disml of these causes of actn sh be entered (ENT 8/27/84 Mld cpy. Mldnote ptys. M D JS-6.
8/29/84	Ntc of mot to join additional deft parties, for lv to file 1st A/C or to remand actn to proper State Crt; memo of P/A; declr of Timothy J. Wheeler, 9/24/84, 10 a.m. Pltf.
9/26/84	Fld Pltf's NOTC OF APPEAL to the 9th Cir C/A frm ord ent on 8/27/84. Ntc of mot to remand to Superior Crt; memo of PA; declr of Timothy J. Wheeler, 9/24/84, 10 a.m. Pltf.
9/28/84	MO [Minute Order]: Jurmnt entred for sole deft in case. 9/29/84, pltf filed mot to remand to State Crt, Crt has no jurisdiet over actn, no actn will be taken by Crt on the instant mot. Note of mot for relief from Judgmnt of ORD or in alternative a mot for reconsideration, 10/29/84, 10 a.m. Pltf.
11/16/84	Lodged ord frm the 9th cir C/A re: 11/2/84 pre-briefing conference
11/21/84	Ord: Accordingly, Pltfs mot to reconsider & mot to set aside judgment are DENIED.

<u>DATE</u>	<u>PROCEEDINGS</u>
1/10/85	REPORTERS TRANS OF PROCEEDINGS taken on 8/20/84.
1/11/85	Supplmntal declrtn of Timothy J. Wheeler. Pltf.
1/22/85	Mot to reconsider is Denied. MO [Minute Or- der]
2/ 8/85	Pltfs mot to reconsider, Crt finds Pltfs mot Denied.
2/12/85	Reporters trans of Proceedings taken on 12/20/85
3/ 1/85	Fld Pltf's Note of Appeal to the Ninth Circ from the ORD dated 2/8/85; fee paid, forms given.
Docket Entries as filed in the United States Court of Ap- peals for the Ninth Circuit.	
1/11/85	Notice of mot & Mot for Limited remand
1/22/85	Opposition of Ford to Mot for Limited remand & mot to vacate; decl. of Richard A. Goette
1/22/85	Order, lodged 1/25/85 in Dist. Ct.
1/25/85	Supplemental decl. of Richard A. Goette

SUMMONS
(CITACION JUDICIAL)

For Court Use Only
(Solo Para Uso De La Corte)

NOTICE TO DEFENDANT: (Aviso a Acusado)
FORD MOTOR COMPANY, a corporation, and
DOES 1 through 50, inclusive

YOU ARE BEING SUED BY PLAINTIFF:
(A Ud. le esta demandando)

GARY BRYANT

You have 30 CALENDAR DAYS after this summons is served on you to file a typewritten response at this court.

A letter or phone call will not protect you; your typewritten response must be in proper legal form if you want the court to hear your case.

If you do not file your response on time, you may lose the case, and your wages, money and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).

Despues de que le entreguen esta citacion judicial usted tiene un plazo de 30 DIAS CALENDARIOS para presentar una respuesta escrita a maquina en esta corte.

Una carta o una llamada telefonica no le ofrecera proteccion; su respuesta escrita a maquina tiene que cumplir con las formalidades legales apropiadas si usted quiere que la corte escuche su caso.

Si usted no presenta su respuesta a tiempo, puede perder el caso, y le pueden quitar su salario, su dinero y otras cosas de su propiedad sin aviso adicional por parte de la corte.

Existen otros requisitos legales. Puede que usted quiera llamar a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de referencia de abogados o a una oficina de ayuda legal (vea el directorio telefonico).

Case Number: (Numero del Caso)
C483981

The name and address of the court is:

(El nombre y direccion de la corte es)

LOS ANGELES COUNTY SUPERIOR COURT
111 North Hill Street
Los Angeles, California 90012

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la direccion y el numero de telefono del abogado del demandante, o del demandante que no tiene abogado, es)

GREENE, O'REILLY, AGNEW & BROILLET
1122 Wilshire Boulevard
Los Angeles, California 90017
(213) 482-1122

DATE: (Fecha) Jan 27, 1984

John J. Corcoran, County Clerk, by
M. S. Smith, Deputy
(Actuario) (Delegado)

(SEAL)

NOTICE TO THE PERSON SERVED: You are served

1. () as an individual defendant.
2. () as the person sued under the fictitious name of (specify):
3. (X) on behalf of (specify):

Ford Motor Company, a corporation

under: (X) CCP 416.10 (corporation)

() CCP 416.20 (defunct corporation)

() CCP 416.40 (association or partnership)

- () CCP 416.60 (minor)
- () CCP 416.70 (conservatee)
- () CCP 416.90 (individual)
- () other:

4. () by personal delivery on (date):
(Proof of Service omitted in printing)
-

GREENE, O'REILLY, AGNEW & BROILLET

A Law Corporation
 1122 Wilshire Boulevard
 Los Angeles, California 90017-1993
 (213) 482-1122
 (213) 482-1350

Attorneys for Plaintiff

SUPERIOR COURT OF THE
 STATE OF CALIFORNIA FOR THE
 COUNTY OF LOS ANGELES

GARY BRYANT,)	
	)	CASE NO.
Plaintiff,	)	C483981
)	
vs.	)	COMPLAINT
	)	FOR DAMAGES
FORD MOTOR COMPANY, a	)	(PERSONAL
corporation, and DOES 1	)	INJURIES)
through 50, inclusive,)	
	)	(Filed
Defendants.	)	Jan. 27, 1984)
_____)	

COMES NOW the plaintiff, and for causes of action against defendants, and each of them, complains and alleges as follows:

GENERAL ALLEGATIONS

1. The true names and/or capacities, whether individual, corporate, associate or otherwise of defendants, DOES 1 through 50, inclusive, and each of them, are unknown to plaintiff who therefore sues said defendants by such fictitious names. Plaintiff is informed and believes, and upon such information and belief alleges, that each of the defendants fictitiously named herein as a DOE is

legally responsible, negligently or in some other actionable manner, for the events and happenings hereinafter referred to and proximately caused the injuries and damages to plaintiff as hereinafter alleged. The plaintiff will seek leave of Court to amend this Complaint to insert the true names and/or capacities of such fictitiously named defendants when the same have been ascertained.

2. Plaintiff is informed and believes, and thereupon alleges, that at all times mentioned herein, defendants, and each of them, including DOES 1 through 50, inclusive, and each of them, were the agents, servants, employees and/or joint venturers of their co-defendants, and were, as such, acting within the course, scope and authority of said agency, employment and/or venture and that each and every defendant, as aforesaid, when acting as a principal, was negligent in the selection and hiring of each and every other defendant as an agent, employee and/or joint venturer.

3. At all times mentioned herein, the plaintiff was and now is a resident of the County of Los Angeles, State of California.

4. Plaintiff is informed and believes, and thereupon alleges, that at all times mentioned herein, the defendant, FORD MOTOR COMPANY, was and now is a corporation organized and existing under and by virtue of the laws of the State of California, and that said defendant was and is authorized to do and is doing business in the State of California and that said defendant has regularly conducted business in the State of California.

5. That at all times mentioned herein, defendants, and each of them, were and are engaged in the business

of manufacturing, fabricating, designing, assembling, distributing, buying, selling, inspecting, servicing, repairing, marketing, warranting, modifying, leasing and advertising a certain Ford Van, Model No. P-800, and each and every component part thereof, for use in interstate commerce and in the State of California.

FIRST CAUSE OF ACTION

(Negligence)

6. Plaintiff realleges as though fully set forth at length and incorporates herein by reference, all of the allegations and statements contained in paragraphs 1 through 5, inclusive, of the General Allegations above.

7. That at all times mentioned herein, defendants, and each of them, negligently and carelessly manufactured, fabricated, designed, assembled, distributed, bought, sold, inspected, serviced, repaired, marketed, warranted, modified, leased and advertised a certain Ford Van, Model No. P-800, and each and every component part thereof, in that same was capable of causing, and in fact did cause, personal injuries to the user and consumer thereof, while being used in a manner reasonably foreseeable, thereby rendering same unsafe and dangerous for use by the consumer, user or bystander.

8. On or about March 1, 1983, plaintiff, while on the premises of his employer, was using said Ford Van, Model No. P-800, and each and every component part thereof, as further described in paragraph 5 above.

9. That at all times mentioned herein, the defendants, and each of them, were engaged in the business of manu-

facturing, fabricating, designing, assembling, distributing, buying, selling, inspecting, servicing, repairing, marketing, warranting, leasing, modifying and advertising that certain Ford Van, Model No. P-800, and each and every component part thereof, which defendants knew, or in the exercise of reasonable care should have known, would be used without inspection for defects in its parts, mechanisms or design.

10. On or about March 1, 1983, as a proximate result of the negligent and careless conduct of the defendants, and each of them, as aforesaid, while using said Ford Van, Model No. P-800, and each and every component part thereof, plaintiff suffered severe and permanent injuries to his person, including, but not limited to, an injury to his back, neck, leg and nervous system.

11. As a direct and proximate result of the conduct of the defendants, and each of them, plaintiff was hurt and injured in his health, strength and activity, sustaining injuries to his body and shock and injury to his nervous system and person, all of which said injuries have caused and continue to cause the plaintiff great physical, mental and nervous pain and suffering. Plaintiff is informed and believes, and thereupon alleges, that said injuries will result in some permanent disability to him, all to his general damage in an amount which will be stated according to proof, pursuant to *California Code of Civil Procedure*, Section 425.10, which amount is in excess of Twenty-Five Thousand Dollars (\$25,000.00).

12. As a direct and proximate result of the conduct of the defendants, and each of them, as aforesaid, plaintiff was compelled to and did employ the services of hos-

pitals, physicians, surgeons, nurses and the like, to care for and treat him, and did incur hospital, medical, professional and incidental expenses, and plaintiff is informed and believes, and thereupon alleges, that by reason of his injuries, he will necessarily incur additional like expenses for an indefinite period of time in the future, the exact amount of such expenses will be stated according to proof, pursuant to *California Code of Civil Procedure*, Section 425.10.

13. As a direct and proximate result of the conduct of the defendants, and each of them, as aforesaid, plaintiff was prevented from attending to his usual occupation, and plaintiff is informed and believes, and thereupon alleges, that he will thereby be prevented from attending to his usual occupation for a period of time in the future, and thereby will also sustain a loss of earning capacity, in addition to lost earnings, past, present and future, the exact amount of such losses is unknown to plaintiff at this time, and when said amounts are ascertained, the plaintiff will ask leave of Court to amend this Complaint and allege said amounts.

SECOND CAUSE OF ACTION

(Breach of Warranty)

14. Plaintiff realleges as though fully set forth at length and incorporates herein by reference, all of the allegations and statements contained in paragraphs 1 through 5, inclusive, of the General Allegations above.

15. That the defendants, and each of them, impliedly and expressly warranted to plaintiff that said Ford Van, Model No. P-800, and each and every component

part thereof, was fit for the purpose for which it was to be used and was free from design and manufacturing defects.

16. That said Ford Van, Model No. P-800, and each and every component part thereof, was not free from such defects nor fit for the purpose for which it was to be used, and was, in fact, defectively manufactured and designed and imminently dangerous to consumers, users and bystanders, in that same was capable of causing, and in fact did cause, personal injury to the user and consumer thereof, while being used in a manner reasonably foreseeable, thereby rendering same unsafe and dangerous for use by the consumer, user or bystander.

17. As a direct and proximate result of the breaches of warranty by the defendants, and each of them, as aforesaid, while using said Ford Van, Model No. P-800, and each and every component part thereof, plaintiff suffered severe and permanent injuries to his person, including but not limited to an injury to his back, neck, leg and nervous system.

18. Plaintiff realleges as though fully set forth at length, and incorporates herein by reference, all of the allegations and statements contained in paragraphs 11 through 13, inclusive, of the First Cause of Action above.

THIRD CAUSE OF ACTION

(Strict Liability)

19. Plaintiff realleges as though fully set forth at length, and incorporates herein by reference, all of the allegations and statements contained in paragraphs 1 through 5, inclusive, of the General Allegations above.

20. That at all times mentioned herein, defendant , and each of them, manufactured, fabricated, designed, assembled, distributed, bought, sold, inspected, serviced, repaired, marketed, warranted, leased, modified and advertised a certain Ford Van, Model P-800, and each and every component part thereof, which contained design and manufacturing defects, in that same was capable of causing and in fact did cause personal injuries to the user and consumer thereof while being used in a manner reasonably foreseeable, thereby rendering same unsafe and dangerous for use by the consumer, user or bystander.

21. As a direct and proximate result of the conduct of the defendants, and each of them, in manufacturing, fabricating, designing, assembling, distributing, buying, selling, inspecting, servicing, repairing, marketing, warranting, leasing, modifying and advertising said Ford Van, Model No. P-800, and each and every component part thereof, which contained design and manufacturing defects, as aforesaid, plaintiff suffered severe and permanent injuries to his person, including, but not limited to, an injury to his back, neck, leg and nervous system.

22. Plaintiff realleges as though fully set forth at length, and incorporates herein by reference, all of the allegations and statements contained in paragraphs 11 through 13, inclusive, of the First Cause of Action above.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows :

1. For general damages in excess of Twenty-Five Thousand Dollars (\$25,000.00), and according to proof ;

2. For hospital, medical, professional and incidental expenses, according to proof ;

3. For loss of earnings and loss of earning capacity, according to proof;
4. For prejudgment interest, according to proof;
5. For costs of suit incurred herein;
6. For damages to plaintiff's property and economic damage related thereto, according to proof.
7. For such other and further relief as the Court may deem just and proper.

DATED: January 24, 1984.

GREENE, O'REILLY, AGNEW
& BROILLET

/s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Attorneys for Plaintiff,
GARY BRYANT

HOWARD J. PRIVETT
 RICHARD A. GOETTE
 McCUTCHEN, BLACK, VERLEGER & SHEA
 600 Wilshire Boulevard
 Los Angeles, California 90017
 (213) 624-2400
 Attorneys for Defendant and (Filed
 Petitioner Ford Motor Company March 29, 1984)

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

GARY BRYANT,	) NO. CV84 2049
	) PAR (Mex)
Plaintiff,)
	) PETITION FOR
v.	) REMOVAL OF
	) CIVIL ACTION;
FORD MOTOR COMPANY, a	) MEMORANDUM
corporation, and DOES 1	) OF POINTS AND
through 50, inclusive,	) AUTHORITIES
	) IN SUPPORT
Defendants.	) THEREOF; AND
_____	) VERIFICATION

Defendant Ford Motor Company, a Delaware corporation located in and with its principal place of business in Michigan, hereby respectfully petitions this Court for Removal pursuant to 28 U.S.C. § 1441 and avers as follows:

1. Ford Motor Company ("Ford") is the only named defendant in a civil action commenced on January 27, 1984, in the Superior Court of the State of California for the County of Los Angeles, entitled, "Gary Bryant vs. Ford Motor Company, a corporation, and Does 1 through 50, inclusive, Defendants," bearing Case No. C 483981 (hereinafter "said action").

2. Copies of the summons and complaint in said action were first received by Ford through its authorized representative on March 1, 1984. Therefore, this petition is filed in this Court within 30 days of receipt by petitioner of the initial pleading, pursuant to 28 U.S.C. § 1446(b). Said summons and complaint are annexed hereto as Exhibit 1 and are incorporated herein by reference.

3. Said action is a civil action for negligence, breach of warranty and strict liability, of which this Court has original jurisdiction pursuant to 28 U.S.C. § 1332. Petitioner is entitled to remove said action to this Court pursuant to 28 U.S.C. § 1441 in that at the time of commencement of said action, and at all times thereafter, said action was and is between citizens of different states; the amount in controversy exceeds the sum of Ten Thousand Dollars (\$10,000), exclusive of interest and costs; and none of the parties in interest properly joined and served as defendants is a citizen of the state in which said action is brought.

4. As alleged by plaintiff Gary Bryant, and as petitioner Ford is informed and believes, Gary Bryant was at the time of commencement of said action, and still is, an individual citizen of the State of California, thus is a citizen only of the State of California for the purposes of this petition as provided in 28 U.S.C. § 1332(c).

5. Petitioner Ford was at the time of commencement of said action, and at all times thereafter, incorporated under the laws of the State of Delaware and has its principal place of business in the State of Michigan, and thus is a citizen only of the State of Delaware and the State of Michigan for the purposes of this petition as provided

in 28 U.S.C. § 1332(c). Ford, the only named defendant, is not a citizen of the State of California.

6. At the time of the commencement of said action, and at all times thereafter, the amount in controversy exceeded the sum of Ten Thousand Dollars (\$10,000), exclusive of interest and costs, in that plaintiff prays for, among other things, \$25,000.00 in damages.

7. "Does 1 through 50, inclusive" are also named as defendants, but plaintiff's complaint indicates that said Does' true names and capacities are unknown. Plaintiff alleges no facts which identify these "Doe" defendants, nor does plaintiff allege where any of these Doe defendants are domiciled or reside. Plaintiff's factual allegations are directed solely at the named defendant. No attempt has been made to identify the Doe defendants or even allege generally that they are legally responsible for the conduct complained of. In such circumstances, as a matter of law, the Doe defendants are mere phantom parties. The allegations with respect to them are sham and cannot affect the jurisdiction of this Court or the propriety of removal of said action to this Court.

8. Petitioner has filed herewith a bond in the amount of \$500.00 with good and sufficient surety conditioned that petitioner will pay all costs and disbursements incurred by reason of this removal proceeding should it be determined that the action was not removable or improperly removed.

WHEREFORE, petitioner prays that said action now pending in the Superior Court of the State of California for the County of Los Angeles, bearing Case No. C 483981,

be removed to the above-entitled United States District Court.

Dated: March 29, 1984.

HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEEN, BLACK,
VERLEGER & SHEA

/s/ Richard A. Goette
Attorneys for Defendant and
Petitioner Ford Motor Company

MEMORANDUM OF POINTS AND AUTHORITIES

This is an action by plaintiff Gary Bryant against Ford Motor Company alleging negligence, breach of warranty and strict liability. The action was commenced in the Superior Court of the State of California for the County of Los Angeles and is properly removable to this Court for the reasons set forth below.

The removal of cases from State to Federal courts is governed by 28 U.S.C. § 1441, which provides in part:

"... [A]ny civil action brought in a State Court of which the District Courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district and division embracing the place where such action is pending."

Original jurisdiction of the pending action is conferred upon this Court pursuant to § 1332 of the Judicial Code by reason of diversity of citizenship.

Section 1332 provides, in relevant part, that diversity jurisdiction is present where the amount in controversy exceeds \$10,000, exclusive of interest and costs, and where the action is between citizens of different states. The present case meets both of these requirements. The complaint filed by plaintiff Gary Bryant includes a prayer for, among other things, damages of \$25,000.00.

It is likewise clear that complete diversity exists in this case. As set forth in the verified petition herein, and as alleged by plaintiff, Gary Bryant is and was at all times a citizen only of the State of California. Petitioner Ford is incorporated under the laws of the State of Delaware and has its principal place of business in the State of

Michigan, and thus is a citizen only of the State of Delaware and the State of Michigan for purposes of jurisdiction and removal.

The complaint also names "Does 1 through 20, inclusive" as defendants. However, the inclusion of obviously sham and fictitious "Doe" defendants does not defeat diversity jurisdiction, nor does it affect the removability of this case. As the Ninth Circuit has recently made clear, a plaintiff cannot defeat diversity jurisdiction by talismanic reliance on "Doe" allegations which give no clue as to the identity of such fictitious parties or their relationship to the action. *Hartwell Corp. v. Boeing Co.*, 678 F.2d 842, 843 (9th Cir. 1982). See also *Asher v. Pacific Power and Light Company*, 249 F.Supp. 671, 675-77 (N.D. Cal. 1965).

In *Hartwell*, *supra*, the court held that the case was properly removable to federal court where the Doe defendants were mentioned only in the caption of the complaint and in a general charging allegation that they "participated in the acts hereinafter complained of, either by ratifying them, or cooperating in them, or otherwise" *Id.* at 893. The court concluded that:

" . . . a plaintiff cannot defeat diversity merely by inserting an unidentified Doe into a complaint without giving us some clue who the Doe might be, how the Doe might fit into the charging allegations, or how the Doe might relate to other parties."

678 F.2d at 843.

The conclusion by the Ninth Circuit is particularly pertinent to this action. In the present action, as in the *Hartwell* case, the Doe defendants only appear in the cap-

tion of the complaint and are nominally mentioned in the first paragraph of the complaint. The complaint gives no other clue to their identity or to any possible relationship of these fictitious parties to this action. The inclusion of Doe defendants in this action is patently insufficient to defeat removal.

Under the rule enunciated in the *Hartwell* case, and the cases on which it relied, the obviously sham and fictitious Doe defendants named in the present action must be disregarded for purposes of determining diversity jurisdiction. Thus, the present case is one between citizens of the State of Delaware and the State of Michigan (petitioner) and the State of California (plaintiff Gary¹ Bryant), and diversity is clearly established under 28 U.S.C. § 1332.

The only remaining question is whether the petition for removal is timely. Section 1446(b) of the Judicial Code provides that a petition is timely if it is filed within 30 days of receipt by the defendant of the initial pleading which establishes that the case is removable. As the petition herein states, petitioner Ford, through its authorized representative, first received copies of the summons and complaint on March 1, 1984. The present petition for removal having been filed within 30 days of that date, and all other conditions for removal having been met, petitioner is entitled to removal of the pending action to this Court.

Dated: March 29, 1984.

HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK,
VERLEGER & SHEA

/s/ Richard A. Goette
Richard A. Goette
Attorneys for Defendant and
Petitioner Ford Motor Company

VERIFICATION

I, RICHARD A. GOETTE, declare and state as follows:

I am an attorney admitted to practice before this Court, a partner with the law firm of McCutchen, Black, Verleger & Shea, the attorneys for petitioner Ford Motor Company and one of the attorneys responsible for the representation of petitioner in this action. No officer of petitioner Ford Motor Company is present in or resides in the State of California who is authorized to verify this petition; and I am authorized to make this verification on behalf of petitioner.

I am informed and believe that at the time of the commencement of the within action, petitioner Ford Motor Company was, and still is, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of Michigan and no other state; that plaintiff Gary Bryant was at the time of the commencement of the within action, and still is, an individual citizen of California; and at all relevant times, the amount in controversy in the within action has ex-

ceeded the sum of \$10,000, exclusive of interest and costs, as alleged in the prayer of the complaint.

I have prepared and read the foregoing Petition for Removal and know the contents thereof, and I am informed and believe that the matters stated therein are true, and on that basis allege that said matters are true.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on March 29, 1984, at Los Angeles, California.

/s/ Richard A. Goette
Richard A. Goette

EXHIBIT 1

[Summons and Complaint filed January 27, 1984,
see at pp. 4-14.]

PROOF OF SERVICE BY MAIL

I, the undersigned, say: I am and was at all times herein mentioned a resident of the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that my business address is 600 Wilshire Boulevard, Los Angeles, California; that I am employed in the office of McCutchen, Black, Verleger & Shea by a member of the Bar of this Court at whose direction the service mentioned herein below was made.

On March 29, 1984, I served upon each of the persons named below a copy of the document to which this declara-

tion is appended by depositing the same in a mail box, mail chute, or like facility regularly maintained by the Government of the United States at Los Angeles, California, enclosed in sealed envelopes with postage thereon fully prepaid addressed respectively as follows:

Timothy J. Wheeler, Esquire
Greene, O'Reilly, Agnew & Broillet
1122 Wilshire Boulevard
Los Angeles, California 90017

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 29, 1984, at Los Angeles, California.

/s/ Jean G. Green
Jean G. Green

HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, California 90017
(213) 624-2400
Attorneys for Defendant
Ford Motor Company

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

NO. 84 2049 PAR (Mex)

ANSWER OF DEFENDANT
FORD MOTOR COMPANY TO
COMPLAINT FOR DAMAGES

(Filed April 3, 1984)

Defendant Ford Motor Company ("Ford") answering the allegations of the complaint herein, admits, denies and alleges as follows:

ANSWER TO GENERAL ALLEGATIONS

1. Answering paragraphs 1 and 2, Ford lacks sufficient information or belief to answer the allegations contained in said paragraphs and, based upon such lack of information or belief, denies the allegations contained in said paragraphs.

2. Answering paragraph 3, Ford is informed and believes that the allegations contained in said paragraph are true and, based upon such information and belief, admits the allegations contained therein.

3. Answering paragraph 4, Ford admits that it is, and at all times relevant hereto was, a corporation and

alleges that it is incorporated under the laws of the State of Delaware with its principal place of business in the State of Michigan. Save and except that which is expressly admitted herein, Ford denies generally and specifically each, every and all of the remaining allegations contained in said paragraph.

4. Answering paragraph 5, Ford alleges that it is principally engaged in the business of designing and assembling quality motor vehicles. In connection with designing and assembling motor vehicles, Ford also manufactures some component parts of motor vehicles. Save and except that which is expressly admitted herein, Ford denies generally and specifically each, every and all of the remaining allegations contained in said paragraph.

ANSWER TO PURPORTED FIRST CAUSE OF ACTION

5. Answering paragraph 6, Ford incorporates by reference as set forth at length herein each and every allegation, admission and denial contained in its answer to the allegations of the general allegations.

6. Answering paragraph 7, Ford denies generally and specifically each, every and all of the allegations contained in said paragraph and specifically denies that said vehicle was negligently or carelessly manufactured, fabricated, designed, assembled, distributed, sold, inspected, marketed, warranted or advertised.

7. Answering paragraph 8, Ford lacks sufficient information or belief to answer the allegations contained in said paragraph and, based upon such lack of information

or belief, denies the allegations contained in said paragraph.

8. Answering paragraph 9, Ford alleges that it is principally engaged in the business of designing and assembling quality motor vehicles. In connection with designing and assembling motor vehicles, Ford also manufactures some component parts of motor vehicles. Save and except that which is expressly admitted herein, Ford denies generally and specifically each, every and all of the remaining allegations contained in said paragraph.

9. Answering paragraphs 10 through 13, Ford denies generally and specifically each, every and all of the allegations contained in said paragraph and specifically denies that plaintiff suffered any injuries or has suffered or will suffer any damages whatsoever.

ANSWER TO PURPORTED SECOND CAUSE OF ACTION

10. Answering paragraph 14, Ford incorporates by reference as set forth at length herein, each and every allegation, admission and denial contained in its answer to the allegations of the general allegations.

1. Answering paragraph 15, Ford lacks sufficient information or belief to answer the allegations contained in said paragraph and, based upon such lack of information or belief, denies the allegations contained in said paragraph.

12. Answering paragraph 16, Ford denies generally and specifically each, every and all of the allegations contained in said paragraph and specifically denies that said vehicle was defectively manufactured or designed.

13. Answering paragraph 17, Ford denies generally and specifically each, every and all of the allegations contained in said paragraph and specifically denies that plaintiff suffered any injuries whatsoever.

14. Answering paragraph 18, Ford incorporates by reference as set forth at length herein, each and every allegation, admission or denial contained in its answer to the first purported cause of action.

ANSWER TO PURPORTED THIRD CAUSE OF ACTION

15. Answering paragraph 19, Ford incorporates by reference as set forth at length herein, each and every allegation, admission and denial contained in its answer to the allegations of the general allegations.

16. Answering paragraphs 20 and 21, Ford alleges that it is principally engaged in the business of designing and assembling quality motor vehicles. In connection with designing and assembling motor vehicles, Ford also manufactures some component parts of motor vehicles. Save and except that which is expressly admitted herein, Ford denies generally and specifically each, every and all of the remaining allegations contained in said paragraph and specifically denies that plaintiff suffered any injuries whatsoever.

17. Answering paragraph 22, Ford incorporates by reference as set forth at length herein, each and every allegation, admission and denial contained in its answer to the allegations of the first purported cause of action.

FIRST AND SEPARATE AFFIRMATIVE DEFENSE

18. As a first and separate affirmative defense to each and every purported cause of action pleaded in the complaint, Ford alleges that at the time and place of the matters alleged in said complaint, plaintiff well knew the risks, hazards and dangers necessarily incident thereto and that, if plaintiff suffered any injuries or is entitled to any damages as alleged in the complaint, said injuries and damages arose from and were caused by said risks, hazards and dangers knowingly and voluntarily assumed by plaintiff.

SECOND AND SEPARATE AFFIRMATIVE DEFENSE

19. As a second and separate affirmative defense to each and every purported cause of action pleaded in the complaint, Ford alleges that the injuries complained of and damages sought by plaintiff in said complaint were caused directly and proximately by plaintiff's own negligence, fault, recklessness or unlawful conduct in and about the matters alleged in the pleading.

THIRD AND SEPARATE AFFIRMATIVE DEFENSE

20. As a third and separate affirmative defense to each and every purported cause of action pleaded in the complaint, Ford alleges that the injuries complained of and damages sought by plaintiff in said complaint were caused directly and proximately by the negligence, fault, recklessness or unlawful conduct of persons other than this answering defendant, whether individual, corporate,

associate or otherwise and whether named or unnamed in said complaint.

FOURTH AND SEPARATE AFFIRMATIVE DEFENSE

21. As a fourth and separate affirmative defense to each and every purported cause of action pleaded in the complaint, Ford alleges that if plaintiff sustained any injuries or is entitled to any damages under the circumstances alleged in the complaint or in any other respect, which is denied, said injuries and damages were wholly or in part directly and proximately caused by plaintiff's own negligence, carelessness, lack of due care and fault or by the negligence, carelessness, lack of due care and fault of third parties. In the event that plaintiff is found to have sustained and to be entitled to any damages, Ford is liable only for that portion of any damages which corresponds to its degree of fault or responsibility and is not liable for any damage attributable to the responsibility, negligence or fault of plaintiff or any other party.

FIFTH AND SEPARATE AFFIRMATIVE DEFENSE

22. As a fifth and separate affirmative defense to each and every purported cause of action pleaded in the complaint, Ford alleges that each and every purported cause of action pleaded fails to state a claim upon which relief can be granted.

WHEREFORE, defendant Ford Motor Company prays:

1. That plaintiff take nothing by his complaint;

2. That in the event that plaintiff is found to have sustained and to be entitled to any damages, the degree of negligence, responsibility or fault of each party who contributed to said damage be determined and defendant Ford be held liable only for that portion of any damages which corresponds to its degree of fault or responsibility; and

3. That defendant Ford have and recover from plaintiff its costs of suit incurred herein and such other and further relief as the Court may deem just and proper in the premises.

Dated: April 3, 1984.

HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK,
VERLEGER & SHEA
/s/ Richard A. Goette
Richard A. Goette
Attorneys for Defendant
Ford Motor Company

(Proof of service omitted in printing)

HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, California 90017
(213) 624-2400
Attorneys for Defendant
Ford Motor Company

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

No. 84 2049 PAR (Mex)

NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT AND
SUMMARY ADJUDICATION OF ISSUES

Date: August 20, 1984

Time: 10:00 a.m.

(Filed July 9, 1984)

TO PLAINTIFF GARY BRYANT AND TO HIS
ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at 10:00 a.m. on August 20, 1984, or as soon thereafter as counsel may be heard in the courtroom of the Honorable Pamela A. Rymer, United States District Judge, 312 North Spring Street, Los Angeles, California 90012, defendant Ford Motor Company will and hereby does move the Court pursuant to the provisions of Rule 56(d) of the Federal Rules of Civil Procedure for an order granting summary adjudication of the issues herein raised.

By this motion, Ford will and hereby does seek an order specifying that:

1. The plaintiff's negligence claim as alleged in the first cause of action of the complaint be dismissed as a matter of law.

2. The plaintiff's breach of warranty claim as alleged in the second cause of action of the complaint be dismissed as a matter of law.

3. The plaintiff's strict liability claim as alleged in the third cause of action of the complaint be dismissed as a matter of law.

Ford's motion for summary adjudication of these issues will be and is made on the ground that there is no genuine issue as to any material fact regarding the various claims raised by plaintiff and addressed herein, and that this moving defendant is entitled to adjudication of these issues as a matter of law.

This motion will be based upon this notice, the accompanying memorandum of points and authorities, the accompanying affidavit, the annexed exhibits, such other documentary evidence and testimony as may be submitted at the hearing, and all the pleadings, records and papers on file herein.

Dated: July 9, 1984.

Respectfully submitted,
HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK,
VERLEGER & SHEA

/s/ Richard A. Goette
Richard A. Goette
Attorneys for Defendant
Ford Motor Company

(Proof of Service omitted in printing)

HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, California 90017
(213) 624-2400
Attorneys for Defendant
Ford Motor Company

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

No. 84 2049 PAR (Mex)

Date: August 20, 1984

Time: 10:00 a.m.

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT AND FOR SUMMARY
ADJUDICATION OF ISSUES

(Filed July 9, 1984)

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. PRELIMINARY STATEMENT	1
A. Introduction	1
B. Statement Of Facts and Plaintiff's Contentions	2
C. Ford Had No Responsibility for any Component Which Plaintiff Claims is Defective	6
II. ARGUMENT	8
A. California Courts Have Consistently Refused to Impose Liability on the Supplier of a Non-defective Component Joined to a Separate, Allegedly, Defective Part	8
B. Negligence may Not Lie Against Ford since Plaintiff's Injuries were Not Caused by any Ford Product	11
C. The Absence of any Defect Precludes Plaintiff's Breach of Warranty Claim	13
D. No Strict Liability Claim Lies Against Ford since No Defect Existed In Any Ford Product and No Ford Product Caused Plaintiff's Injury	13
III. CONCLUSION	15

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Baker v. Chrysler Corp.</i> , 55 Cal.App.3d 710, 127 Cal.Rptr. 745 (1976)	14

TABLE OF AUTHORITIES (Cont'd)

	Page(s)
CASES	
<i>Cronin v. J.B.E. Olson Corp.</i> , 8 Cal.3d 121, 104 Cal.Rptr. 433, 501 P.2d 1153 (1972)	14
<i>Greenman v. Yuba Power Products, Inc.</i> , 59 Cal. 2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963)	14
<i>Grinnell v. Charles Pfizer & Co.</i> , 274 Cal.App.2d 424, 79 Cal.Rptr. 369 (1969)	14
<i>Kalinowski v. Joseph T. Ryerson & Son, Inc.</i> , 242 App.Div. 43, 272 N.Y.S. 759 (1934)	10
<i>McGoldrick v. Porter-Cable Tools</i> , 34 Cal. App. 3d 885, 110 Cal.Rptr. 481 (1973)	10, 11
<i>McLeery v. Eli Lilly & Co.</i> , 87 Cal.App.3d 77, 150 Cal.Rptr. 730 (1978)	12
<i>Miller v. Los Angeles County Flood Control Dist.</i> , 8 Cal.3d 689, 106 Cal.Rptr. 1, 505 P.2d 193 (1973)	12, 14
<i>Preissman v. Ford Motor Co.</i> , 1 Cal.App.3d 841, 82 Cal.Rptr. 108 (1969)	14
<i>Premo v. Grigg</i> , 237 Cal.App.2d 192, 46 Cal.Rptr. 683 (1965)	11
<i>Preston v. Up-Right, Inc.</i> , 243 Cal.App.2d 636, 52 Cal.Rptr. 679 (1966)	14
<i>Tresham v. Ford Motor Co.</i> , 275 Cal.App.2d 403, 79 Cal.Rptr. 883 (1969)	15
<i>Trust v. Arden Farms Co.</i> , 50 Cal.2d 217, 324 P.2d 583 (1958)	13
<i>Wiler v. Firestone Tire & Rubber Co.</i> , 95 Cal. App.3d 621, 157 Cal.Rptr. 248 (1979)	9, 10, 12
<i>Zambrana v. Standard Oil Co.</i> , 26 Cal.App.3d 209, 102 Cal.Rptr. 699 (1972)	10

I. Preliminary Statement

A. Introduction

There is no factual or legal support for the claims raised by plaintiff Gary Bryant against defendant Ford Motor Company ("Ford"). An examination of plaintiff's liability claims has in fact demonstrated that Ford is an entirely inappropriate party to this action.

This is a relatively uncomplicated personal injury action in which plaintiff contends that on March 1, 1983, while in the course and scope of his employment with United Parcel Service, Inc. ("UPS") and while driving a 1968 truck owned by his employer, he was involved in a single vehicle accident. As a consequence, plaintiff reportedly sustained certain personal injuries to, among other areas, his back. Ford was joined as defendant based upon plaintiff's belief that the truck he was operating was designed and manufactured by Ford. The underlying complaint contains claims for relief premised upon negligence, breach of warranty and strict liability. There is no indication in the complaint as to the particular basis of plaintiff's claims—merely that the underlying vehicle was a Ford product and was somehow defective.

Plaintiff filed this action in state court on January 27, 1984, and Ford was served with the complaint on March 1, 1984. Ford thereafter petitioned for the removal of the action based upon diversity jurisdiction. Pretrial discovery since removal has now established the basis for plaintiff's liability theories. In essence, plaintiff contends that he sustained injuries in the vehicle due to the inadequacy of the vehicle seat belt system and the driver's seat

and therefore contends that the design and manufacture of the vehicle was defective.

While plaintiff may have a claim for relief against some party, recovery against Ford is not justified under any of the theories pleaded by plaintiff. Ford built only the bare chassis of the vehicle in question. It was not connected in any way with the body of the vehicle, including the restraint system and driver's seat which have been implicated in this action and allegedly caused the injuries sustained by plaintiff.

Plaintiff's negligence claim cannot lie against Ford since there is no suggestion of a breach of any duty owed by Ford to plaintiff nor is there any relationship of proximate cause between these injuries and any action or omission on the part of Ford. Similarly, the breach of warranty and strict products liability allegations do not suggest, nor does the record support, any defect in the product designed, manufactured, assembled or sold by Ford. California courts have consistently refused to extend liability to manufacturers of component parts which happened to be attached to defective products which cause an injury.

For each and all of the foregoing reasons and as more fully discussed below, Ford respectfully submits that its motion for summary judgment should be granted.

B. Statement of Facts and Plaintiff's Contentions

Plaintiff in this action, Gary Bryant, alleges that he was injured on March 1, 1983, while operating a truck owned by UPS. While the original complaint offers little insight into plaintiff's claims, all information provided

since Ford appeared in the action has remained consistent. (For ease of reference, we have attached a copy of the complaint to the accompanying appendix as Exhibit A.) In sum, plaintiff has based his claim for recovery upon alleged defects in the design and manufacture of the seat belt system and driver's seat. He has never alleged any design or manufacturing defect in any component of the vehicle designed or assembled by Ford.

At the time of the early meeting of counsel, plaintiff's theories were first disclosed. In the subsequent joint report which was filed with this Court, the basis of this action was described as follows:

"[The] accident involved a truck operated by plaintiff and reportedly owned by United Parcel Service. Ford Motor Company is alleged to be the manufacturer of the vehicle. As against the defendant, plaintiff contends that the passive restraint system was inadequate due to the absence of a shoulder harness."

Exhibit B, p. 2.

As will be explained below, Ford had no involvement with the manufacture of the body of the vehicle or the restraint system.

In later propounding contention interrogatories to plaintiff, Ford sought the identity of "each and every" component of the vehicle which plaintiff claims contained a design or manufacturing defect. Plaintiff elaborated upon his liability theories only by including the driver's seat. His verified interrogatory responses provide the gravamen of his claim.

Interrogatory No. 4:

In paragraph 20 of the complaint, you allege, among other things, that the vehicle which plaintiff was operating at the time of his accident, and each component thereof, "contained design and manufacturing defects." With respect to said allegation, do you contend that the subject vehicle or any component thereof contained any design defects? If so:

(a) Describe in detail each and every part or component of the subject vehicle which you contend contained a design defect;

(b) Describe in detail each error, if any, which you claim was made in the design of any part or component of the subject vehicle;

(c) Describe in detail how each part or other component of the subject vehicle that you claim was defectively designed could have been designed better; and

(d) Identify all evidence, including each person and document, which you contend supports your contention, in whole or in part, that any part or component of the subject vehicle was defectively designed.

Response to Interrogatory No. 4:

Yes.

(a) the seat belt system as well as the driver's seat;

(b) Both the seat belt system and the seat were inadequate in their design and manufacture so as to substantially contribute to plaintiff's injuries;

(c) Plaintiff objects to this subpart of this interrogatory. As asked it requires the plaintiff to do the work of the defendant, which was to design the subject vehicle properly. Plaintiff is under no obligation to do so;

(d) Plaintiff is unaware of any such documentation at this time, however discovery and investigation are continuing.

Exhibit C, Response to interrogatory no. 4, pp. 5-6.

The following interrogatory sought the identity of each component which plaintiff claims was defectively manufactured. The response was identical and in fact expressly incorporated the prior answer. *See Exhibit C, Response to interrogatory no. 5, pp. 6-7.*

Plaintiff has thus simply claimed that "Ford Motor Company failed to implement in its design of the subject vehicle an adequate safety belt system as well as an adequate seating for the driver of the subject vehicle." *See Exhibit C, Response to interrogatory no. 3, p. 4.* Plaintiff is plainly wrong, however, in his assertion that Ford somehow had any responsibility for the design of the seat belt system or seat. It did not.

In responding to interrogatories propounded by plaintiff, Ford has explained that it designed and assembled only certain component parts associated with the chassis of the vehicle reportedly involved in the underlying accident. *See Exhibit D, Response to interrogatory no. 1, page 3.* Ford further explained that it did not design or manufacture the body of that vehicle. *See Exhibit D, Response to interrogatory no. 17, page 9.* Ford has moreover confirmed that it did not manufacture the seat belt or any component part thereof which was part of the vehicle at the time of the accident. *See Exhibit D, Response to interrogatory no. 20, page 11.*

While the contentions of plaintiff and the discovery responses of Ford provide little reason for the joinder of Ford, the attached affidavit demonstrates that there can be no reason for Ford to remain a party to this action.

C. Ford Had No Responsibility for any Component Which Plaintiff Claims is Defective

The accompanying affidavit of James I. Scott demonstrates the absence of any factual basis for plaintiff's alle-

gations against Ford. Mr. Scott has been employed by Ford as an engineer for twenty eight years and is competent to render an opinion concerning the absence of any support for plaintiff's claims based upon his experience and inspection of the subject vehicle.

Mr. Scott has explained that after plaintiff and UPS provided the proper identification of the vehicle involved in the underlying accident, that vehicle was inspected by representatives of Ford and plaintiff at a UPS service center in San Marcos, California on May 10, 1984. (See Scott affidavit, ¶ 10.) Mr. Scott had an opportunity to examine the vehicle, including the chassis, body and interior components. The vehicle is the typically brown UPS delivery van which has become a common sight on our streets and highways.

The examination of the vehicle revealed that *only* the chassis is a Ford product. (Scott affidavit, ¶ 12.) Based upon the reported vehicle identification number, the inspection confirmed that the chassis was one of the P-500 series which was built at the Michigan truck assembly plant in July 1968. (Scott affidavit, ¶ 11.) While inspection of the vehicle body failed to disclose the identity of the manufacturer (Scott affidavit, ¶ 13), the body of the vehicle, including the seat belt system and driver's seat, were not designed, manufactured or assembled by Ford. (Scott affidavit, ¶ 14.)

Mr. Scott has been employed in various engineering capacities at Ford and has had engineering responsibilities for the design and assembly of various chassis. (Scott affidavit, ¶ 4.) As Mr. Scott explains, the chassis provides only the foundation for the finished vehicle and basically includes only the power train and suspension system. (Scott affidavit, ¶ 4.) While the chassis can be independently driven to facilitate shipment, Ford did not install a driver's seat or seat belt system on any P-500 chassis. (Scott affidavit, ¶ 6.) Indeed, the P-500 series chassis were driven by installing a wooden dunnage frame to the chassis

and placing a wooden crate on the frame to allow use of the steering wheel. (Scott affidavit, ¶ 7.) Ford never designed, manufactured, assembled or installed any restraint system or driver's seat for any P-500 chassis which was sold as a single incomplete unit. (Scott affidavit, ¶ 8.)

Since Ford does not maintain sales records for more than ten years, it has no information concerning the purchaser of the particular chassis of the subject vehicle. (Scott affidavit, ¶ 13.) However, no matter which individual or organization purchased this chassis, Ford has never provided any seat belt system or driver's seat with any P-500 chassis. (Scott affidavit, ¶ 8.) Ford has moreover relied entirely upon the manufacturer of the completed vehicle to select and install all necessary equipment, including any seat belt system and driver's seat. (Scott affidavit, ¶ 8.) Such decisions are exclusively within the control of the chassis purchaser who decides upon the type of vehicle body and interior that will be manufactured, assembled and then installed on the chassis. (Scott affidavit, ¶ 8.) Ford similarly relies upon the manufacturer of the completed vehicle to certify that all equipment, including the seat belt system and driver's seat, is in compliance with any applicable governmental regulations. (Scott affidavit, ¶ 9.)

In view of plaintiff's liability theories, there is simply no factual basis for the involvement of Ford in this action.

II. *Argument*

- A. *California Courts Have Consistently Refused to Impose Liability on the Supplier of a Nondefective Component Joined to a Separate, Allegedly, Defective Part*

The only involvement of Ford Motor Company in this matter was to supply a bare chassis to an independent purchaser. There is no allegation, contention or discovered fact which suggests that anything other than the seat belt system or driver's seat was a proximate cause of plain-

tiff's alleged injuries. As discussed above, while the restraint system and driver's seat *added* to the bare chassis may contain defects which support plaintiff's claim under negligence, breach of warranty and products liability theories, the parts of the vehicle manufactured by Ford clearly do not.

California courts have refused to hold suppliers of nondefective component parts, like Ford in this case, liable for any product claims. For a supplier or manufacturer of a product to be liable for a defect, plaintiff must establish a defect in the product offered by that supplier or manufacturer. The court in *Wiler v. Firestone Tire & Rubber Co.*, 95 Cal.App.3d 621, 157 Cal. Rptr. 248 (1979), for example, faced a situation in which a plaintiff had been injured when his automobile left the road at high speed. It was discovered later that the car had a deflated tire and plaintiff sued both the manufacturer of the tire and the manufacturer of the car.

Discovery revealed no defects in the tire. It was in fact the claim of plaintiff that no defects were present in the tire, except for the valve stem which had been manufactured and attached to the tire by the automobile manufacturer, not the tire company. Summary judgment was granted in the tire company's favor and upheld by the Court of Appeals.

"A component part manufacturer may be held liable for damages caused by a component part which was defective at the time it left the component part manufacturer's factory. . . . [citations omitted.]

"However, as plaintiffs' evidence shows no defect in the component part, the tire, which was manufactured by Firestone, it may not be held liable. (*Zambrana v. Standard Oil Co.*, 26 Cal.App.3d 209, 216-219, 102 Cal.Rptr. 699 (1972); *McGoldrick v. Porter-Cable Tools*, 34 Cal.App.3d 885, 888, 110 Cal.Rptr. 481 (1973); *Kalinowski v. Joseph T. Ryerson & Son, Inc.*,

242 App.Div. 43, 272 N.Y.S. 759, 762 (1934.)"
95 Cal.App.3d at 629.

In this case, plaintiff has not attempted to make any showing of defect in the chassis supplied by Ford.

The reasoning and conclusion of the court in *Wiler* apply equally to this action. Discovery has revealed no claimed defect in the chassis built by Ford. Plaintiff has claimed that the only defects exist in the restraint system and driver's seat. Those components were manufactured and then attached to the finished vehicle by other parties, not unlike the defective valve stem attached to the Firestone tire. Moreover, just as Firestone may rely on the care of an automobile manufacturer (*Id.* at 629), Ford could reasonably believe that manufacturers and assemblers of seats and restraint systems would insure proper design of those mechanisms. Ford is similarly entitled to summary judgment in its favor.

Other cases confirm the *Wiler* court result. In *McGoldrick v. Porter-Cable Tools*, 34 Cal.App.3d 885, 110 Cal. Rptr. 481 (1973), plaintiff was injured when a power saw flew apart. He sued both the manufacturer of the saw and the manufacturer of the stand to which the saw had been attached. The trial court granted a non-suit in favor of the manufacturer of the stand, stating, "When the evidence is so palpably insufficient that a verdict against [that defendant] could not be sustained, it is the duty of the trial court to forestall the cost and delay of further proceedings by granting defendant's motion for non-suit . . . [citations omitted]" 34 Cal.App.3d at 888. There is simply no legal basis for suppliers of non-defective component parts to be held liable when those parts are attached to defective products which may cause injury.

The cited authorities and uncontroverted facts compel the conclusion that, as a matter of law, Ford may not be held liable for providing the bare chassis to which the finished body which contained an allegedly defective driver's

seat and restraint system were eventually attached. Summary judgment for Ford is the proper remedy.

B. Negligence may Not Lie Against Ford since Plaintiff's Injuries were Not Caused by any Ford Product

Plaintiff's first cause of action alleges negligence in the design and manufacture of the vehicle. The court in *Premo v. Grigg*, 237 Cal.App.2d 192, 46 Cal.Rptr. 683 (1965) set out the classic definition of an action in negligence.

"A cause of action for negligence consists of four elements: (1) the duty of the defendant with respect to the injured person's injury; (2) the violation of that duty; (3) the causal relation between the defendant's conduct and the injury suffered; and (4) the plaintiff's loss, i.e. damages [citations omitted.]"

237 Cal.App.2d at 195.

An analysis of these criteria in this case demonstrates that no claim of negligence could lie against Ford.

First, it was not Ford's duty to provide an adequate seat belt system or driver's seat. It was the duty of the designers, manufacturers and assemblers of the restraint system and seat to provide for the safety of that mechanism for its intended use. Ford could reasonably depend on their abilities to design, assemble and attach a safe restraint system and seat. *Wiler v. Firestone Tire & Rubber Co.*, 95 Cal.App. 625, 629-30, 157 Cal.Rptr. 248 (1979).

Second, even if Ford owed a duty to the plaintiff (which is extremely doubtful), there was no breach of that duty. Any breach of duty resulted from possible defective manufacture, design and assembly of the restraint system and driver's seat. Plaintiff has alleged no failure

in the chassis to perform in a safe and reasonable manner. There is no question that Ford fully performed its duty of safety in relation to that component.

Third, the law of negligence is clear that the plaintiff has the burden of proving that the defendant's defective product proximately caused his injury. *See, e.g., Miller v. Los Angeles County Flood Control Dist.*, 8 Cal.3d 689, 704, 106 Cal.Rptr. 1, 505 P.2d 193 (1973); *McLeery v. Eli Lilly & Co.*, 87 Cal.App.3d 77, 82, 150 Cal.Rptr. 730 (1978).

Plaintiff here is patently unable to establish a causal relation between Ford's product and his injury. According to his own contentions and because of the allegedly faulty restraint system and driver's seat, plaintiff was injured in the underlying accident. Ford's product played no part in the alleged injuries; it was merely present at the same place and time. This is not sufficient to sustain a finding of proximate cause.

C. *The Absence of any Defect Precludes Plaintiff's Breach of Warranty Claim*

Plaintiff's breach of warranty theory also requires proof of a design or manufacturing defect in order to establish that Ford breached any warranty obligations. *See, e.g., Trust v. Arden Farms Co.*, 50 Cal.2d 217, 324 P.2d 583 (1958), which involved an allegedly defective glass milk bottle which shattered and injured plaintiff. The California Supreme Court held that evidence of a defect in the product was a prerequisite to sustain recovery against the defendant milk company under a warranty theory.

"Was there a breach of warranty upon the part of Arden? No. *There was no evidence that the bottle*

was defective when delivered by Arden to plaintiff, and therefore there is no basis for claiming any breach of warranty."

50 Cal.2d at 223 (emphasis added).

There is similarly no evidence or contention that the chassis embodied any defect. Absent such a claim, there can be no sustainable breach of warranty.

D. *No Strict Liability Claim Lies Against Ford since No Defect Existed in any Ford Product and No Ford Product Caused Plaintiff's Injury*

It is axiomatic that for Ford to be strictly liable for injuries caused by defects in its product, such defects must actually be present in the product manufactured. As set forth above, any defect in the restraint system or driver's seat which allegedly injured plaintiff did not exist in the chassis provided by Ford. Plaintiff is thus unable to show that any Ford product proximately caused his injuries.

The California Supreme Court in *Miller v. Los Angeles Flood Control District*, 8 Cal.3d 689, 703-04, 106 Cal. Rptr. 1, 505 P.2d 1983 (1973), has identified the limits of strict products liability.

"Strict liability in tort does not apply unless the product . . . allegedly causing the injury was in a defective condition. (*Cronin v. J.B.E. Olson Corp.*, 8 Cal.3d 121, 130, 104 Cal.Rptr. 433, 501 P.2d 1153 (1972); *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 62, 27 Cal.Rptr. 697, 377 P.2d 897 (1963). The burden is upon the plaintiff to establish the defective condition of the product and to prove that the defect proximately caused plaintiff's injury. (*Grinnell*

v. Charles Pfizer & Co., 274 Cal.App.2d 424, 435, 79 Cal.Rptr. 369 (1969); *Preston v. Up-Right, Inc.*, 243 Cal.App.2d 636, 639, 52 Cal.Rptr. 679 (1966).”

The allegedly defective condition in this case simply has no connection with any product manufactured by Ford.

To maintain a cause of action for strict products liability, the plaintiff must establish (1) that defendant was somehow responsible for a defective product which was in its defective condition at the time it was manufactured and (2) a causal relation between the defect and the injury. *See e.g., Baker v. Chrysler Corp.*, 55 Cal.App.3d 710, 715, 127 Cal.Rptr. 745 (1976). *Preissman v. Ford Motor Co.*, 1 Cal.App.3d 841, 852, 82 Cal.Rptr. 108, 114 (1969), *Tresham v. Ford Motor Co.*, 275 Cal.App.2d 403, 410, 79 Cal.Rptr. 883, 887 (1969).

It is clear from the facts in this action that plaintiff does not contend that the Ford chassis at the time Ford manufactured and sold it was defective and caused an injury to the plaintiff. The only purported defects claimed by plaintiff pertain to the restraint system and driver's seat. Each of these products was designed, manufactured, assembled and installed by other parties. The proximate cause of the alleged injuries, in the products liability context, could only be the restraint system and driver's seat. Ford simply had nothing to do with that apparatus and there is no conceivable basis for a strict liability claim against Ford for injuries caused by such allegedly defective products. Summary judgment should be granted in Ford's favor.

III. Conclusion

There is no evidence or contention to implicate Ford in this action for injuries allegedly sustained by plaintiff. To the contrary, the evidence in this action and the decisional authorities fully exonerate Ford. The claims for relief raised by plaintiff can and should be summarily adjudicated as a matter of law.

Dated: July 9, 1984.

Respectfully submitted,
HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK,
VERLEGER & SHEA

/s/ Richard A. Goette
Attorneys for Defendant
Ford Motor Company

AFFIDAVIT OF JAMES I. SCOTT

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

JAMES I. SCOTT, being first duly sworn, deposes and states as follows:

1. I am currently employed as a design analysis engineer by Ford Motor Company ("Ford"). I am personally acquainted with the facts set forth below and, if called as a witness, could and would competently testify to the matters recited in this affidavit.

2. I am a 1957 graduate production engineer from Detroit College of Applied Science located in Detroit.

Michigan. I have also taken courses in mechanical engineering from Old Dominion College in Norfolk, Virginia in 1964 and in engine design from Henry Ford Community College in Dearborn, Michigan in 1966. I am a member of the Society of Automotive Engineers.

3. I have been employed in various engineering capacities with Ford, a summary of which is set forth below:

a. During 1956 to 1958, I was a production engineer assigned to the Highland Park Assembly Plant located in Highland Park, Michigan. The facility was involved with the design and assembly of all truck lines.

b. During 1958 to 1960, I was assigned to the Louisville Assembly Plant located in Louisville, Kentucky as a truck product engineer. That facility was involved with the design and assembly of various medium, heavy and super heavy duty trucks and truck bodies;

c. During 1960 to 1965, I was assigned to the Norfolk Assembly Plant located in Norfolk, Virginia as a vehicle resident engineer. That facility was involved with the design and assembly of light and medium trucks;

d. During 1965 to 1966, I was assigned to the Dearborn Assembly Plant located in Detroit, Michigan, as a vehicle resident engineer. That facility was then involved with the design and assembly of Mustang, Cougar and Falcon automobiles;

e. In 1966 and 1967, I was assigned to the Wayne Assembly Plant located in Wayne, Michigan, and was quality control manager. That facility was involved with the design and assembly of Ford and Mercury automobiles;

f. During 1967 to 1973, I was assigned to the Wixom Assembly Plant located in Wixom, Michigan and was quality assurance manager. That facility was responsible for the design and assembly of Thunderbirds and Lincoln automobiles;

g. During 1973 to 1980, I was assigned to World Headquarters in Dearborn, Michigan, as a product analysis engineer on the quality control staff; and

h. During 1980 to the present, I have been a design analysis engineer assigned to the medium and heavy truck section. In my present capacity, I am responsible for the investigation and analysis of claimed product failures involving medium and heavy trucks.

4. During my employment in various engineering capacities with Ford, I have had an opportunity to participate in the design and assembly of chassis which include only the power train and suspension system. These chassis are designed and assembled for the purpose of supplying incomplete vehicle units to commercial manufacturers who are then fully responsible for the design, manufacture and assembly of the completed vehicle, including the body and most interior components.

5. The P-500 was a particular chassis series which Ford built between the late 1940's and 1979. That chassis series was designed primarily for use in the manufacture and assembly of completed parcel trucks.

6. Ford designed and assembled the base P-500 chassis as a separate incomplete unit. While that chassis was driveable to facilitate the shipment of the unit to the pur-

chaser, the P-500 chassis sold by Ford did not include the finished driver's seat or any seat belt system.

7. To assist in the transportation of that unit and to place the vehicle controls within reach of any operator involved with its shipment, Ford installed a wooden dunnage frame to the P-500 chassis. Instead of installing any type of finished seat, Ford would utilize a wooden crate for the driver to sit on and operate the vehicle.

8. Based upon my employment experience, Ford never designed, manufactured or assembled seats or seat belt systems for the P-500 chassis. Since Ford was providing merely an incomplete unit, the builder of the completed vehicles was responsible for the selection and installation of such equipment.

9. Ford has in fact entirely relied upon the manufacturer of the completed vehicle to certify that all equipment, including the seat belt system and driver's seat, are in compliance with any applicable governmental regulations.

10. On May 10, 1984, I attended an inspection of the vehicle involved in plaintiff's accident which is reportedly owned by United Parcel Service ("UPS") at a UPS service center in San Marcos, California. That inspection was attended by representatives of Ford, UPS and plaintiff in this action. The vehicle was identified by serial number P50BLD59493, license number 1P09925 and UPS number 18603. Although it was not possible to confirm the serial number normally imprinted on the chassis without disassembling the vehicle, the reported license number and UPS number were consistent with the vehicle exam-

ined. The examined vehicle was the same vehicle which was identified to me as having been involved in plaintiff's accident by representatives of UPS.

11. The inspection revealed that the subject vehicle included a P-500 chassis which, based upon the reported serial number, was built at the Michigan Truck Assembly Plant in Wayne, Michigan in 1968.

12. The inspection confirmed that *only* the P-500 chassis of the subject vehicle is a Ford product. The remainder of the vehicle, including the body, seat belt system and driver's seat, were not designed, manufactured or assembled by Ford.

13. During my inspection, I found no apparent identifying plate or label which would have revealed the manufacturer of the completed vehicle. While Ford retains no records beyond ten years which would identify the purchaser of the chassis, such information can presumably be obtained from the original purchaser of the completed vehicle.

14. It is my engineering opinion that the portions of the subject vehicle reportedly involved in plaintiff's accident and which I inspected on May 10, 1984, including the seat belt system and driver's seat, were designed, manufactured and assembled by parties other than Ford Motor Company.

/s/ James I. Scott
James I. Scott

(Jurat omitted in printing)

(Proof of Service omitted in printing)

HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, California 90017
(213) 624-2400
Attorneys for Defendant
Ford Motor Company

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

No. 84 2049 PAR (Mex)

APPENDIX OF EXHIBITS IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT AND FOR
ADJUDICATION OF ISSUES

(Filed July 9, 1984)

Date: August 20, 1984

Time: 10:00 a.m.

Annexed hereto for the Court's convenience are the following exhibits to the Motion for Summary Judgment and Summary Adjudication of Issues filed by defendant Ford Motor Company:

Exhibit A Complaint

Exhibit B Joint report of early meeting

Exhibit C Plaintiff's answers to interrogatories propounded by Ford

Exhibit D Ford's answers to interrogatories propounded by plaintiff

Dated: July 9, 1984.

HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK,
VERLEGER & SHEA

/s/ Richard A. Goette
Attorneys for Defendant
Ford Motor Company

EXHIBIT A

[Summons and Complaint, filed January 27, 1984,
see at pp. 4-14.]

EXHIBIT B

HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, California 90017
(213) 624-2400

Attorneys for Defendant
Ford Motor Company

TIMOTHY J. WHEELER
GREENE, O'REILLY, AGNEW & BROILLET
1122 Wilshire Boulevard
Los Angeles, California 90017
(213) 482-1122

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

No. 84 2049 PAR(Mex)

JOINT REPORT OF
EARLY MEETING

(Filed May 2, 1984)

In accordance with Local Rule 6.1, counsel for the parties personally met on April 19, 1984, and submit the following joint status report:

1. *Preliminary.* Plaintiff's counsel elaborated upon the allegations contained in the complaint and provided details concerning the vehicular accident of March 1, 1983, which forms the subject matter of this action. That accident involved a truck operated by plaintiff and reportedly owned by United Parcel Service. Ford Motor Company is alleged to be the manufacturer of the vehicle. As against the defendant, plaintiff contends that the passive restraint system was inadequate due to the absence of a shoulder harness. Although the precise identification of the involved vehicle remains unclear (model, year, type, etc.), plaintiff's counsel has provided the reported license number which will permit the parties to obtain pertinent records maintained by the California Department of Motor Vehicles and thereby allow for a specific identification. Counsel representing Ford Motor Company agreed to request this information and will attempt to make it available by May 3, 1984.

2. *Discovery.* After it is properly identified, the parties agree that the subject vehicle will be inspected. Such an inspection is essential for identifying all appropriate parties and defining plaintiff's liability theory. The parties are informed and believe that the vehicle is currently located in San Diego and anticipate that it will be inspected by May 31, 1984.

Subsequent to the vehicle inspection, the parties will agree upon a deposition schedule. Analysis of the liability issues will initially include the depositions of plain-

tiff, plaintiff's reported supervisor at United Parcel Service and other employees at United Parcel Service who may have relevant information concerning the plaintiff, his training, the accident and the repair of the subject vehicle. It is probable that additional depositions will be required of plaintiff's examining and/or treating physicians.

After the vehicle is properly identified, plaintiff also intends to serve interrogatories on defendant to ascertain the nature and extent of its involvement with the design, manufacture and assembly of the subject vehicle. It is probable that the defendant will serve contention interrogatories which inquire into the factual basis of plaintiff's liability contentions, together with a request for production of any documents supporting plaintiff's allegations.

Plaintiff intends to depose individuals responsible for the design, manufacture, selection and installation of the passive restraint system in the subject vehicle, as well as those individuals, if any, involved in the testing of said system, both in the subject vehicle and other similar models.

3. *Witnesses.* Plaintiff's counsel identified those witnesses known at this time who are believed to have knowledge of the facts relating to the underlying accident and the injuries allegedly sustained by plaintiff. These witnesses include plaintiff's reported supervisor at United Parcel Service, Andrew Karrin, and physicians who have examined and/or treated plaintiff, including Drs. Hiseon, Varley and Richley.

4. *Documents.* At the early meeting, plaintiff's counsel provided copies of all available medical records from plaintiff's treating physician, Dr. Richard Richley. Those records encompass, among other things, plaintiff's surgeries which he contends were necessitated by the underlying accident. Plaintiff's counsel is seeking to obtain records from other examining physicians and a compilation of all related medical expenses. Plaintiff's counsel will moreover provide earnings records and documents supporting plaintiff's lost wage claim.

5. *Appearance of Additional Parties.* It is likely that the workers' compensation carrier for plaintiff's employer will appear due to benefits paid to plaintiff subsequent to the accident. The parties understand that plaintiff's disability is in fact the subject of pending compensation proceedings. The appearance of additional parties necessary to determine liability issues depends upon the proper vehicle identification and ascertaining which entities, other than defendant Ford Motor Company, may have been involved in the design, manufacture, assembly and sale of the subject vehicle and its component parts.

6. *Settlement.* Due to the current uncertainty concerning the identification of the involved vehicle and the appearance of additional parties, the parties agree that settlement discussions at this juncture are premature.

7. *Trial Estimate.* The parties are unable to estimate the time which will be required for trial due to the current uncertainty concerning the possible appearance of additional parties.

Dated: May 2, 1984.

Respectfully submitted,

HOWARD J. PRIVETT

RICHARD A. GOETTE

McCUTCHEN, BLACK, VERLEGER & SHEA

/s/ Richard A. Goette

Richard A. Goette

Attorneys for Defendant

Ford Motor Company

Dated: May 1, 1984.

GREENE, O'REILLY, AGNEW & BROILLET

/s/ Timothy J. Wheeler

Timothy J. Wheeler

Attorneys for Plaintiff

EXHIBIT C

(Space Below For Filing Stamp Only)

Law Offices of
GREENE, O'REILLY, AGNEW & BROILLET

1122 Wilshire Boulevard

Los Angeles, California 90017-1993

(213) 482-1122

(213) 482-1350

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

CASE NO. C 84 2049 PAR (mex)
PLAINTIFF'S RESPONSES TO
INTERROGATORIES PROPOUNDED
BY DEFENDANT, FORD MOTOR
COMPANY
(First Set)

COMES NOW plaintiff, GARY BRYANT, and responds to the first set of interrogatories propounded by defendant, FORD MOTOR COMPANY, as follows, pursuant to Rule 33 of the *Federal Rules of Civil Procedure*.

It should be noted that this responding party has not fully completed his investigation of the facts relating to this case, has not fully completed his discovery in this action and has not completed his preparation for trial. All of the answers contained herein are based only upon such information and documents which are presently available to and specifically known to this responding party and disclose only those contentions which presently occur to such responding party. It is anticipated that further discovery, independent investigation, legal research and analysis will supply additional facts, add meaning to the known facts, as well as establish entirely new factual conclusions and legal contentions, all of which may lead to substantial additions to, changes in and variations from the contentions herein set forth. The following interrogatory responses are given without prejudice to responding party's right to produce evidence of any subsequently discovered fact or facts which this responding party may later recall. Responding party accordingly reserves the right to change any and all answers herein as additional facts are ascertained, analyses are made, legal research is completed and contentions are made. The answers con-

tained herein are made in a good faith effort to supply as much factual information and as much specification of legal contentions as is presently known but should in no way be to the prejudice to plaintiff in relation to further discovery, research or analysis.

Interrogatories and Responses

Interrogatory No. 1:

Identify each address you lived at during the ten years prior to the date of the subject accident and the dates you lived at each residence.

Response to Interrogatory No. 1:

1974-November, 1975: 4711 Chickasaw Court, San Diego, CA 92711; December, 1975-August, 1977: 3255 Armstrong Place, San Diego, CA 92711; August, 1977-September, 1978, 4572 Cape May, Ocean Beach, CA; September, 1978-April, 1979: 470122 Sierra Blvd., Mammoth Lakes, CA 93546; May, 1979-October, 1979: 4711 Chickasaw Street, San Diego, CA; October, 1979-February, 1981: 2466 Sunflower Terrace, Vista, CA 92083; February, 1981-May, 1981: 1050 Rock Springs Road, Escondido, CA 92026; May, 1981-April, 1983: 133 West Vermont Avenue, Escondido, CA 92025; May, 1983-June, 1984: 300 South Ivy, #55, Escondido, CA.

Interrogatory No. 2:

With respect to your employment history during the ten year period preceding the date of the subject accident;

(a) Identify the name, address and telephone number of each of your employers during said period and the dates of such employment; and

(b) Identify your rate of pay and your average monthly income received from each employer at the time you began and left each employer.

Response to Interrogatory No. 2:

(a) San Diego County, 1600 Pacific Highway, San Diego, CA, 1974-December, 1977;

(b) \$4.05 per hour to \$4.65 per hour;

(a) United Parcel Service, Ponson Road, San Diego, CA, December, 1977;

(b) Approximately \$5.50 per hour;

(a) United Parcel Service, Ponson Road, San Diego, CA, April, 1978-September, 1978;

(b) Approximately \$5.50 per hour to \$6.00 per hour;

(a) San Diego Nautilus, Morena Blvd., San Diego, CA, May, 1979-April, 1980;

(b) \$5.50 per hour to \$7.00 per hour; averaged 50 hours per week;

(a) Nautilus International, 911 East Valley Parkway, Escondido, CA 92025, May, 1980-July, 1981;

(b) \$8.00 per hour; 40 hours per week;

(a) United Parcel Service, 111 North Bingham Drive, San Marcos, CA 92069, December, 1981;

(b) Approximately \$7.00 per hour; 40 to 50 hours per week;

(a) United Parcel Service, 111 North Bingham Drive, San Marco, CA 92069, December, 1982;

(b) Approximately \$7.20 per hour; 40 to 50 hours per week;

(a) United Parcel Service, 111 North Bingham Drive, San Marcos, CA, February 14, 1983-March 1, 1983;

(b) Approximately \$7.20 per hour; 40 hours per week.

Interrogatory No. 3:

If you contend that the injuries allegedly sustained by you in the subject accident were caused in whole or in part by the acts and/or omissions of Ford Motor Company, please describe and explain each act, omission or combination thereof which you claim caused said injuries.

Response to Interrogatory No. 3:

Without further prejudice to amend, supplement or modify, pursuant to continuing discovery and investigation, the plaintiff answers this interrogatory as follows:

Defendant, Ford Motor Company, failed to implement in its design of the subject vehicle an adequate safety belt system as well as adequate seating for the driver of the subject vehicle.

Interrogatory No. 4:

In paragraph 20 of the complaint, you allege, among other things, that the vehicle which plaintiff was operat-

ing at the time of his accident, and each component thereof, "contained design and manufacturing defects." With respect to said allegation, do you contend that the subject vehicle or any component thereof contained any design defects? If so:

(a) Describe in detail each and every part or component of the subject vehicle which you contend contained a design defect;

(b) Describe in detail each error, if any, which you claim was made in the design of any part or component of the subject vehicle;

(c) Describe in detail how each part or other component of the subject vehicle that you claim was defectively designed could have been designed better; and

(d) Identify all evidence, including each person and document, which you contend supports your contention, in whole or in part, that any part or component of the subject vehicle was defectively designed.

Response to Interrogatory No. 4:

Yes.

(a) The seat belt system as well as the driver's seat;

(b) Both the seat belt system and the seat were inadequate in their design and manufacture so as to substantially contribute to plaintiff's injuries;

(c) Plaintiff objects to this subpart of this interrogatory. As asked it requires the plaintiff to do the work of the defendant, which was to design the subject

vehicle properly. Plaintiff is under no obligation to do so;

(d) Plaintiff is unaware of any such documentation at this time, however discovery and investigation are continuing.

Interrogatory No. 5:

In paragraph 20 of the complaint, you allege, among other things, that the vehicle which plaintiff was operating at the time of his accident, and each component thereof, "contained design and manufacturing defects." With respect to said allegation, do you contend that the subject vehicle or any component thereof contained any manufacturing defects? If so:

(a) Describe in detail each and every part or component of the subject vehicle which you contend contained a manufacturing defect;

(b) Describe in detail each error, if any, which you claim was made in the manufacture of any part or component of the subject vehicle;

(c) Describe in detail how each part or other component of the subject vehicle that you claim was defectively manufactured could have been manufactured better; and

(d) Identify all evidence, including each person and document, which you contend supports your contention, in whole or in part, that any part or component of the subject vehicle was defectively manufactured.

Response to Interrogatory No. 5:

(a) Refer to response to interrogatory no. 4(a) above.

(b) Refer to response to interrogatory no. 4(b) above.

(c) Refer to response to interrogatory no. 4(c) above.

(d) Refer to response to interrogatory no. 4(d) above.

Interrogatory No. 6:

If the subject vehicle was equipped with seat belts or shoulder harnesses or straps, state whether you were wearing the seat belts and/or shoulder harness at the time of the subject accident.

Response to Interrogatory No. 6:

I was wearing the only available lap seat belt at the time of this accident. There were no shoulder harnesses available.

Interrogatory No. 7:

Identify each person who you saw during the twenty-four (24) hour period prior to the accident, and twenty-four (24) hours thereafter.

Response to Interrogatory No. 7:

Charlene Bryant and Shawn Bryant, 133 West Vermont Avenue, Escondido, CA 92025; Tony Larson, driving supervisor, United Parcel Service, 111 North Bingham

Drive, San Marcos, Ca; and Andy Carrin, supervisor, United Parcel Service, address given above.

24 hours thereafter: same as above plus Dr. Hiskin, 161 Thunder Drive, Suit 112, Vista, CA.

Interrogatory No. 8:

With respect to any doctor you have seen as a result of injury you alleged to have received from the subject accident:

(a) Identify the name, address and telephone number of each doctor; and

(b) Describe all treatment or surgery each doctor recommended was or may be required and state how long any future treatment may be required.

Response to Interrogatory No. 8:

The information requested may be obtained from plaintiff's medical records listed which have already been supplied to the defendant:

Sharp Cabrillo Hospital, Tri-City Hospital, Dr. Richard Richley, Dr. David G. Freeman, Dr. John S. Kitchin, Dr. Arthur Varley, Dr. Eric Hiskin, North County Radiology Medical Group.

In addition, plaintiff underwent a fifth surgery at Sharp Cabrillo Hospital. Date of admission: May 23, 1984, date of release: June 2, 1984, which involved a lumbar fusion. Medical records have been ordered but not yet obtained. Plaintiff will supply defendant with these medical records upon receipt.

Interrogatory No. 9:

With respect to any injury or disability you suffered or any hospitalization of you prior to the subject accident:

(a) Describe each such injury or hospitalization and the date(s) thereof; and

(b) Identify the name, address and telephone number of each doctor who treated you for each injury or hospitalization.

Response to Interrogatory No. 9:

(a) November, 1974, cyst removal, Mission Bay Hospital, 3030 Bunker Hill Street, San Diego, CA;

(b) Dr. R. Sarver, 3737 Moraga Avenue, San Diego, CA.

Interrogatory No. 10:

With respect to any person not previously identified in your answers to these interrogatories, please identify the name and address of each and every doctor, chiropractor or therapist you have ever seen concerning any personal medical condition prior to the subject accident, including the date(s) thereof.

Response to Interrogatory No. 10:

Dr. E. Miles, 1947 Cable Street, Ocean Beach, CA.

Interrogatory No. 11:

If you have ever been involved, in any way, in any motor vehicle accidents, other than the subject accident,

identify the date and place of each said accident and each person involved in each said accident.

Response to Interrogatory No. 11:

August 16, 1980, near San Marcos, CA, along with Charlene Bryant; April, 1981, near Escondido, CA, again along with Charlene Bryant.

Interrogatory No. 12:

With respect to any indebtedness you have incurred to date for all medical services which you claim or as special damages for injuries suffered from the subject accident:

(a) State and itemize the amount of indebtedness; and

(b) Identify each person, other than yourself, who paid all or a part of such indebtedness.

Response to Interrogatory No. 12:

All medical bills available to the plaintiff at this time are attached hereto.

Interrogatory No. 13:

With respect to any claimed wage loss resulting from injuries sustained in the subject accident and the calculation thereof, please state:

(a) The amount claimed for past loss; and

(b) The amount claimed for future loss.

Response to Interrogatory No. 13:

(a) At the time of the subject accident, plaintiff was earning a starting salary of \$7.20 per hour, 40 hours per week. Thereafter, plaintiff was scheduled to earn approximately \$15.20 per hour after six months with U.P.S.;

(b) At the present time, plaintiff has not hired the services of an expert consultant to calculate the amount of future lost wages, and therefore is not in a position to accurately respond to this interrogatory. Discovery and investigation are continuing.

(Insurance Form deleted in printing)

(Medical Statements omitted in printing)

EXHIBIT D

HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, California 90017
(213) 624-2400

Attorneys for Defendant
Ford Motor Company

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

(Caption omitted in printing)

NO. 84-2049 PAR (Mex)

**ANSWERS AND OBJECTIONS OF
FORD MOTOR COMPANY TO INTERROGATORIES
PROPOUNDED BY PLAINTIFF**

**TO PLAINTIFF GARY BRYANT AND TO
HIS ATTORNEYS OF RECORD:**

Defendant Ford Motor Company ("Ford") hereby answers and objects to the interrogatories propounded by plaintiff Gary Bryant, without prejudice to subsequently discovered evidence as follows:

Preliminary Statement

Ford generally objects to the description of the "subject vehicle" in the definition section of plaintiff's interrogatories. The vehicle reportedly involved in plaintiff's alleged accident and apparently owned by United Parcel Service ("UPS") was inspected by representatives of Ford and plaintiff at a UPS service center in San Marcos, California on May 10, 1984. Although Ford has not yet obtained any title documents to confirm the identification of that vehicle, it is informed and believes that the UPS identification number and license number are consistent with the vehicle involved in plaintiff's alleged accident. However, the inspection failed to reveal any imprinted serial number on the chassis and the identification plate had been removed from the body. Ford is informed and believes that the vehicle identification number set forth in the definition section of plaintiff's interrogatories (P50BLD59493) is therefore based only upon records maintained by the California Department of Motor Vehicles and UPS, and not upon the vehicle itself. Ford's responses to the following interrogatories are therefore subject to such qualification concerning the identity of the vehicle.

Beyond any uncertainties associated with proper vehicle identification, Ford further objects to plaintiff's description of the "subject vehicle" as a "Ford truck." While Ford did design and assemble certain component

parts of the chassis of the vehicle which was reportedly involved in plaintiff's alleged accident and inspected on May 10, 1984, it had no involvement with the design, manufacture or assembly of the body of that vehicle. The inspection failed to reveal the identification of the manufacturer of the truck body due to the absence of any apparent identifying plate or label. However, Ford is informed and believes that such information can be obtained through records maintained by UPS.

INTERROGATORIES

Interrogatory No. 1:

Did you manufacture the subject vehicle or any component part thereof?

Response to Interrogatory No. 1:

Ford states that it designed and assembled certain component parts associated with the chassis of the vehicle that was reportedly involved in plaintiff's alleged accident and inspected on May 10, 1984. Based upon the vehicle identification number provided in plaintiff's interrogatories, the chassis was built at the Michigan Truck assembly plant in Wayne, Michigan in July 1968.

Interrogatory No. 2:

If your answer to Interrogatory No. 1, above, is in the affirmative, with respect to the manufacture of the subject vehicle, please answer the following:

(a) At what plant, in what geographical location, was the subject vehicle manufactured?

Response to Interrogatory No. 2:

Ford refers to its response to interrogatory no. 1.

Interrogatory No. 3:

State the true and correct name, address and telephone number (current) of each and every person, firm and/or corporation known to you that ever had possession of the subject vehicle from the time it was first sold by you to the present.

Response to Interrogatory No. 3:

Ford objects to this interrogatory on the grounds that it is vague, ambiguous, indefinite and uncertain, and that it is overly broad, unduly burdensome and oppressive. Ford did not sell the vehicle which was reportedly involved in plaintiff's alleged accident and inspected on May 10, 1984. Ford has no reasonable or satisfactory means of determining who "ever had possession of the subject vehicle."

Interrogatory No. 4:

What is the specific model designation or number for the subject vehicle and/or its component parts?

Response to Interrogatory No. 4:

Ford objects to this interrogatory on the grounds that it is vague, ambiguous, indefinite and uncertain, and that it is overly broad, unduly burdensome and oppressive. Ford has no reasonable or satisfactory means of identifying what is meant by the "specific model designation or number for the subject vehicle and/or its component parts."

Without waiving its objections, however, Ford states that the chassis of the vehicle reportedly involved in plaintiff's alleged accident and inspected on May 10, 1984, is identified as P-500.

Interrogatory No. 5:

Have you ever or do you now hold any patents for any part of the subject vehicle or vehicles of the same model which part or parts have any safety value or safety function?

Response to Interrogatory No. 5:

Ford objects to this interrogatory on the grounds that it is vague, ambiguous, indefinite and uncertain, and on the grounds that it is overly broad, unduly burdensome and oppressive. Ford has no reasonable or satisfactory means of determining what is meant by "part or parts [which] have any safety value or safety function."

Interrogatory No. 6:

Was the safety of the operator or user of the subject vehicle considered in the design and/or assembly and/or manufacture of the subject vehicle?

Response to Interrogatory No. 6:

Ford objects to this interrogatory on the grounds that it is vague, ambiguous, indefinite and uncertain. Without waiving its objections, however, Ford states that it did not design, assemble or manufacture the body of the vehicle which was reportedly involved in plaintiff's alleged accident and inspected on May 10, 1984.

Interrogatory No. 7:

State the name, address and telephone number of all persons who participated in a supervisory way in the design, assembly and/or manufacture of the subject vehicle and its component parts.

Response to Interrogatory No. 7:

Ford objects to this interrogatory on the grounds that it is vague, ambiguous, indefinite and uncertain, and that it is overly broad, unduly burdensome and oppressive. Ford has no reasonable or satisfactory means of identifying each and every individual who "participated in a supervisory way in the design, assembly and/or manufacture of the subject vehicle and its component parts." Without waiving its objections, however, Ford states that it did not design, assemble or manufacture the body of the vehicle which was reportedly involved in plaintiff's alleged accident and inspected on May 10, 1984.

Interrogatory No. 8:

State the name, current address and telephone number of the *current* chief of product design for your corporation or company.

Response to Interrogatory No. 8:

Ford objects to this interrogatory on the grounds that it is vague, ambiguous, indefinite and uncertain, and that it seeks to elicit information which is wholly irrelevant to the subject matter of this action and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving its objections, however, Ford states that

it did not design the body of the vehicle which was reportedly involved in plaintiff's alleged accident and inspected on May 10, 1984.

Interrogatory No. 9:

Did you sell the subject vehicle? If so, please answer:

- (a) The date of the sale of the subject vehicle;
- (b) The name and address of the person from your corporation who represented your company or corporation in the sale;
- (c) State the name and address of the person who purchased the subject vehicle from your company or corporation;
- (d) State the date of shipment from your premises or from your possession to the purchaser of the subject vehicle.

Response to Interrogatory No. 9:

No.

Interrogatory No. 10:

State the name, current address and telephone number of all persons known to you who participated in the actual design of the subject vehicle and/or the actual design of any of the component parts of the subject vehicle which were intended to have a safety function or safety value with respect to the operator or user of the subject vehicle.

Response to Interrogatory No. 10:

Ford objects to this interrogatory on the grounds that it is vague, ambiguous, indefinite and uncertain, and on the grounds that it overly broad, unduly burdensome and oppressive. Ford has no reasonable or satisfactory means of identifying "all persons known to you who participated in . . . the actual design of any of the component parts of the subject vehicle which were intended to have a safety function or safety value with respect to the operator or user of the subject vehicle."

Interrogatory No. 11:

Do you contend that you did not design the subject vehicle and/or any of its component parts?

Response to Interrogatory No. 11:

Ford contends that it did not design the body of the vehicle which was reportedly involved in plaintiff's alleged accident and inspected on May 10, 1984. Ford designed and assembled only certain component parts of the chassis of that vehicle.

Interrogatory No. 12:

Subsequent to the sale of the subject vehicle, have you at any time provided warning signs to be placed at or about any model of the subject vehicle, prototype, subsequent models or vehicles of the subject vehicle sold by you?

Response to Interrogatory No. 12:

Ford did not sell the vehicle which was reportedly involved in plaintiff's alleged accident and inspected on May 10, 1984.

Interrogatory No. 13:

Are you aware of any tests, whatsoever, having been made on any part of the subject vehicle or similarly equipped vehicles of the same model *which tests concern the safety of operators or users of those vehicles?*

Response to Interrogatory No. 13:

Ford objects to this interrogatory on the grounds that it is vague, ambiguous, indefinite and uncertain, and on the grounds that it is overly broad, unduly burdensome and oppressive. Ford has no reasonable or satisfactory means of determining what is meant by "tests, whatsoever, . . . which tests concern the safety of operators or users of those vehicles." Without waiving its objections, however, Ford states that it had no involvement with the design and assembly of the body of the vehicle which was reportedly involved in plaintiff's alleged accident and inspected on May 10, 1984.

Interrogatory No. 14:

Do you contend that the plaintiff was using the subject vehicle in a manner that was unforeseeable to you at the time of his injury?

Response to Interrogatory No. 14:

Ford does not have any information at the present time to contend that the plaintiff was using any vehicle in a manner which was unforeseeable at the time of his alleged accident. However, Ford states that its investigation concerning the accident, the proper identification of the "subject vehicle" and discovery into this action are continuing.

Interrogatory No. 15:

State the name, current address and telephone of the person answering these interrogatories, and state his or her professional resume.

Response to Interrogatory No. 15:

Ford states that the responses herein were prepared by its counsel. Ford also refers to the attached verification.

Interrogatory No. 16:

Have you conducted any investigation, whatsoever, concerning the subject incident? If so, please state the following:

(a) The name, current address and current phone number of the person conducting said investigation;

Response to Interrogatory No. 16:

Ford objects to this interrogatory on the grounds that it seeks to elicit information which is protected from disclosure by the work product doctrine and the attorney-client privilege. Without waiving its objections, however, Ford states that it retained the firm of Kurtz, Richards, Wilson & Co. to conduct a preliminary investigation concerning the facts and circumstances of this action.

Interrogatory No. 17:

State the original date of design and original date of manufacture of the subject vehicle.

Response to Interrogatory No. 17:

Ford states that it did not design or manufacture the body of the vehicle which reportedly involved in plaintiff's alleged accident and inspected on May 10, 1984. However, it did design and assemble certain component parts of the chassis of that vehicle in July 1968.

Interrogatory No. 18:

Have you employed or consulted with anyone to make any tests or investigations to determine the cause of plaintiff's injury herein? If so, for each person, investigation or test, state:

(a) The name, address and telephone number of the laboratory or person conducting such investigation or test;

Response to Interrogatory No. 18:

Ford refers to its response to interrogatory no 16.

Interrogatory No. 19:

Are you protected by liability for the subject vehicle? If your answer is other than "no", state with respect to each such insurance policy:

(a) The number or numbers of the policy or policies, named insured or insureds, insurer or insurers, effective and expiration date or dates and limits of liability for each coverage;

Response to Interrogatory No. 19:

Ford does have a policy of insurance applicable to claims of this nature. Its self-retention, however, far ex-

ceeds any potential recovery in this action. Thus, for all practical purposes, Ford does not have liability insurance coverage applicable to this action.

Interrogatory No. 20:

Did you manufacture the seat belt, lap harness or any component part thereof which was a part of the subject vehicle at the time of this accident.

Response to Interrogatory No. 20:

No.

Interrogatory No. 21:

If your answer to the preceding interrogatory is anything other than in the affirmative, with respect to the manufacturer of the seat belt, lap harness or any component part thereof, please answer the following:

(a) In what year was the manufacture of the lap harness or seat belt completed;

(b) At what plant, and what geographical location was the subject seat belt or lap harness manufactured;

(c) State the names, address and telephone numbers of the person, firm or corporation to whom you first sold or consigned the seat belt or lap harness;

(d) State the date on which the manufacturer first sold or consigned the seat belt or lap harness and the date on which the manufacturer first shipped the seat belt or lap harness from their premises pursuant to sale or consignment.

Response to Interrogatory No. 21:

Ford objects to this interrogatory on the grounds that it is vague, ambiguous, indefinite, uncertain and unintelligible, and on the grounds that it is overly broad, unduly burdensome and oppressive. Ford has no reasonable or satisfactory means of determining the details concerning the "manufacturer of the seat belt, lap harness or any component part thereof" of the vehicle which was reportedly involved in plaintiff's alleged accident and inspected on May 10, 1984.

Dated: June 18, 1984.

HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK,
VERLEGER & SHEA

/s/ Richard A. Goette

Richard A. Goette

Attorneys for Defendant
Ford Motor Company

V E R I F I C A T I O N

STATE OF MICHIGAN)
) SS:
COUNTY OF WAYNE)

ROBERT D. SANBORN, being duly sworn, deposes and says that he is an authorized agent of Ford Motor Company and that he verifies the foregoing Answers and Objections of Ford Motor Company to Interrogatories Propounded by Plaintiff for and on behalf of Ford Motor Company for and on behalf of Ford Motor Company; that the matters stated therein are not within the personal

knowledge of deponent; that the facts stated therein have been assembled by authorized employees and counsel of Ford Motor Company, and deponent is informed that the facts stated therein are true.

/s/ Robert D. Sanborn

(Jurat omitted in printing)

(Proof of Service omitted in printing)

HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, California 90017
(213) 624-2400

Attorneys for Defendant
Ford Motor Company

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

No. 84 2049 PAR (Mex)

STATEMENT OF UNCONTROVERTED FACTS
AND CONCLUSIONS OF LAW

(Lodged July 9, 1984)

DATE: August 20, 1984

TIME: 10:000 a.m.

FINDINGS OF FACT

1. Plaintiff is a California resident and former employee of United Parcel Service, Inc.

2. Ford Motor Company ("Ford") is incorporated under the laws of the State of Delaware with its principal place of business in the State of Michigan.

3. Ford has been and is principally engaged in the business of designing and assembling motor vehicles and some components thereof, including the P-500 chassis.

4. On March 1, 1983, plaintiff was involved in a single vehicle accident which occurred while he was driving a truck owned by his employer.

5. As a consequent of the accident on March 1, 1983, plaintiff sustained certain personal injuries due to the inadequacy of the seat belt system and driver's seat.

6. Ford did not design manufacture or assemble the seat belt system or driver's seat in the vehicle involved in plaintiff's accident and only designed and assembled certain component parts of the chassis of that vehicle.

7. All statements set forth below as conclusions of law, which might be deemed to be findings of fact, are incorporated herein by reference.

CONCLUSIONS OF LAW

1. All statements set forth above as findings of fact, which might be deemed to be conclusions of law, are incorporated herein by this reference.

2. This Court has jurisdiction under 28 U.S.C. 1332, and the amount in controversy exceeds the value of \$10,000, exclusive of interest and costs.

3. There is no genuine issue of material fact which would support the plaintiff's negligence claim in the first cause of action in the complaint herein which shall be dismissed as a matter of law.

4. There is no genuine issue of material fact which would support the plaintiff's breach of warranty claim in the second cause of action in the complaint herein which shall be dismissed as a matter of law.

5. There is no genuine issue of material fact which would support the plaintiff's strict liability claim in the third cause of action in the complaint herein which shall be dismissed as a matter of law.

6. Ford is entitled to summary adjudication of the issues and dismissal of the first, second and third causes of action.

Dismissal of these causes of action and this case shall be entered accordingly.

Dated: August —, 1984.

Pamela A. Rymer
United States District Judge

Presented By:

HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK, VERLEGER & SHEA

By /s/ Richard A. Goette
Richard A. Goette

Attorneys for Defendant
Ford Motor Company

(Proof of service omitted in printing)

Law Offices of
GREENE, O'REILLY, AGNEW & BROILLET
1122 Wilshire Boulevard
Los Angeles, California 90017-1993
(213) 482-1122
(213) 482-1350

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

CASE NO. C 84 2049 PAR (mex)

STATEMENT OF GENUINE ISSUES PURSUANT TO
U.S. DISTRICT COURT RULE 7.14.2

Date: August 20, 1984

Time: 10:00 a.m.

Plaintiff submits this Statement of Genuine Issues in response to defendant's motion for summary judgment dated July 9, 1984, pursuant to *U.S. District Court Local Rule 7.14.2*.

Plaintiff's Issue: Insufficient documentation or other facts exist at this time to determine Ford's involvement with regard to the following:

(a) Whether design specifications were provided by Ford to subsequent purchasers of the vehicle chassis for implementation of the design of the complete vehicle including defective seat and seat restraint system;

(b) Whether subsequent purchasers of the vehicle chassis consulted Ford regarding implementation of the defective seat and/or seat restraint system and what design input Ford provided to them;

(c) Whether Ford provided plans, diagrams, blueprints, etc., to subsequent purchasers of the vehicle chassis providing the foundation or basic design principles of the seats and/or seat restraint systems to be used with the subject chassis;

(d) Whether Ford engaged in a cooperative venture with other designers of component parts to be used with the subject chassis, including but not limited to the defective seat and seat restraint system.

Lack of facts in this instance in and of itself creates an issue of material fact in that plaintiff is unable to determine at this time *all* liable parties in this action or the extent of Ford's liability. Ford's policy dictates that records and documentation pertaining to their vehicles be destroyed after ten years. As such, plaintiff has conducted substantial discovery and investigation to determine the parties liable for plaintiff's injuries. In doing so plaintiff has determined the names of additional potential defendants who plaintiff intends to bring into this lawsuit at the proper time. Until then, plaintiff is unable to determine the exact extent of Ford's liability in this matter.

DATED: August 6, 1984

GREENE, O'REILLY, AGNEW
& BROILLET

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Attorneys for Plaintiff,
GARY BRYANT

(Proof of service omitted in printing)

Law Offices of
GREENE, O'REILLY, AGNEW & BROILLET
1122 Wilshire Boulevard
Los Angeles, California 90017-1993
(213) 482-1122
(213) 482-1350

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

CASE NO. C 84 2049 PAR (mex)

PLAINTIFF'S OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
THEREOF; DECLARATION OF
TIMOTHY J. WHEELER

(Filed August 10, 1984)

Date: August 20, 1984

Time: 10:00 a.m.

TO ALL PARTIES HEREIN AND TO THEIR
ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at 10:00 a.m. on August 20, 1984, or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Pamela A. Rymer, United States District Judge, 312 North Spring Street, Los Angeles, California 90012, plaintiff, GARY BRYANT, will oppose defendant's, FORD MOTOR COMPANY, motion for summary judgment and summary adjudication of issues pursuant to the provisions of Rule 56(d) of the *Federal Rules of Civil Procedure* and the *United States District Court Local Rules 7.14.2.*

Plaintiff's opposition will be based on the grounds that there is still substantial controversy with regard to issues of material fact existing as to defendant, FORD MOTOR COMPANY.

Said opposition will further be based upon the attached memorandum of points and authorities, the declaration of Timothy J. Wheeler, separate "statement of genuine issues," and all papers already on file in this matter, as well as any oral argument which may be presented at the time of the hearing of this motion.

DATED: August 6, 1984

GREENE, O'REILLY, AGNEW
& BROILLET

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Attorneys for Plaintiff,
GARY BRYANT

MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

This case arises out of a single vehicle accident which occurred on or about March 1, 1983. As a result of this accident, plaintiff sustained severe and permanent bodily injury making it necessary for the plaintiff to undergo five back surgeries since the date of this accident. Based on information and belief, plaintiff filed his complaint in this matter on January 27, 1984, in Los Angeles County Superior Court against the sole defendant, FORD MOTOR COMPANY, a corporation. Said defendant is being prosecuted on theories of negligence, strict liability and breach

of warranty. Based on information and belief, plaintiff contends that his injuries could have been prevented or minimized by the implementation of a more properly designed and manufactured driver's seat and/or seat restraint system. Based on information and belief that the United Parcel Service van involved in this accident was manufactured by FORD MOTOR COMPANY, plaintiff filed its complaint against Ford and thereafter commenced discovery.

At the present time, defendant, FORD MOTOR COMPANY, is attempting to obtain summary judgment on the grounds that:

(a) Ford manufactured only the chassis of the subject vehicle;

(b) Ford had no involvement with the manufacture of the body of the subject vehicle or the restraint system implemented therein;

(c) Ford had no involvement with the manufacture of the body of the subject vehicle or the driver's seat implemented therein;

(d) Ford cannot be held liable under theories of negligence, strict liability or breach of warranty for a defective product and its component parts which it did not design or manufacture.

It is the contention of the plaintiff at this time that there is insufficient documentation or information available to the plaintiff to make an accurate determination as to the degree of involvement of Ford in the design, manufacture and/or implementation of the seating system

as well as the seat restraint system found in the subject vehicle at the time of this accident.

FORD MOTOR COMPANY has responded to plaintiff's interrogatories in part as follows.

(a) Ford designed and manufactured only the "chassis" of the subject vehicle.

(b) Ford did not design the body of the subject vehicle or any of its component parts other than those component parts of the chassis of the subject vehicle.

(c) Ford did not design or manufacture the seat or any part of the seat restraint system found in the subject vehicle at the time of the accident and has no information as to who did design or manufacture these component parts.

(Copies of defendant's responses to plaintiff's interrogatories are attached hereto as Exhibit "A".)

In furtherance of its responses to plaintiff's interrogatories, defendant, by correspondence dated June 29, 1984, informed the plaintiff that Ford does not retain its vehicle records beyond ten years, and therefore could not determine who purchased the chassis from Ford and then manufactured and assembled the finished vehicle. (A copy of defendant's letter is attached hereto as Exhibit "B".)

Due to the fact that Ford has destroyed its records with regard to the subject chassis, and has not provided any documentation to the plaintiff which would substantiate that it *did not* have any involvement in the design or manufacture of the seating system or the seat restraint system, plaintiff has been left with no alternative but to conduct

discovery to determine who in fact did take part in the design, manufacture and implementation of the defective component parts. Until such time as plaintiff is able to ascertain through other parties the exact involvement of FORD MOTOR COMPANY with regard to the defective component parts, it is premature to allow defendant, FORD MOTOR COMPANY, relief by summary judgment as such relief would be extremely prejudicial to the plaintiff as well as other potential defendants in this lawsuit.

Based upon information provided to the plaintiff by attorneys for United Parcel Service, plaintiff has ascertained that the subject vehicle is a 1968 Ford U.P.S. vehicle. (Please refer to Exhibit "C".) In a letter dated July 9, 1984, and attached hereto as Exhibit "D", attorneys for U.P.S. have informed us that the vehicle was purchased by them from City Ford Company in Los Angeles, CA, on or about May 31, 1968. Other discovery and investigation have informed the plaintiff that the seating system implemented in the subject vehicle was manufactured by General Seating and Sash Company of Tompton, Pennsylvania. The same discovery and investigation *has not* yet provided the plaintiff with information or documentation to determine the designer or manufacturer of the seat restraint system implemented in the subject vehicle.

Based upon its investigation, plaintiff suspects that the seat restraint system was manufactured by a California corporation based in Pacoima, California, and that the body of the subject vehicle was designed and manufactured by Grumman, another California corporation. However, at this point in time, neither Ford or U.P.S. has

been able to provide the plaintiff with sufficient documentation to inform the plaintiff as to the parties responsible for the decision to implement the defective seat and seat restraint system into the subject vehicle. Further discovery must be conducted against each of the parties named above. Plaintiff has not as yet named any of the above-mentioned parties in this lawsuit and has not done so as discovery and investigation are continuing. After sufficient discovery and investigation have been conducted, plaintiff intends to name City Ford, Grumman, General Seating and Sash Company, as well as the seat restraint system designer and manufacturer.

Based upon plaintiff's "Statement of Genuine Issues," it is clear that there is a substantial number of issues to be determined as well as facts to be determined before defendant, FORD MOTOR COMPANY, can be exonerated from liability for plaintiff's injuries. The above-named potential defendants may or may not have records on file which will inform the plaintiff as to the name of those persons or entities responsible for implementing, designing and manufacturing the defective seat and seat restraint system into the subject vehicle. Ford, as the manufacturer of the chassis, laid the foundation and provided basic design principles for the subject vehicle in its entirety. It is possible that Ford provided design specifications and/or consultation to subsequent purchasers of their chassis for implementation of the seats and seat restraint system.

Until such time as plaintiff has had time to conduct further discovery and investigation, particularly as against the abovenamed potential defendants, and in lieu of the fact that defendant, FORD MOTOR COMPANY, as well

as U.P.S. have been unable to provide plaintiff with critical information and documentation which would substantiate Ford's claim that it had no other involvement other than the design and manufacture of the chassis of the subject vehicle, it is far too premature to grant defendant's motion for summary judgment and summary adjudication of the issues. Plaintiff intends, at the appropriate time, to make its motion to remand this matter to the Superior Court of California, naming California defendants, City Ford Company and Grumman, if future discovery and investigation in fact reveal that these parties are viable defendants in this matter.

As the only showing which the plaintiff is required to make at this time is that some triable issue of fact exists as to the plaintiff's complaint in this action, the plaintiff has gone well beyond his burden of showing, by clear and convincing evidence, that as a result of the discovery and investigation conducted up to the present time, that there are several issues of material fact yet to be determined in this matter, thereby precluding the defendant's motion for summary judgment at this time. The following points and authorities are clear that in the case of doubt a summary judgment must be denied.

II

A MOTION FOR SUMMARY JUDGMENT SHALL BE GRANTED ONLY IF ALL THE PAPERS SHOW THAT THERE IS NO TRIABLE ISSUE AS TO ANY MATERIAL FACT THAT THE MOVING PARTY IS ENTITLED TO A JUDGMENT AS A MATTER OF LAW.
C.C.P. § 437(c)

III

PAPERS FILED IN OPPOSITION TO A MOTION FOR SUMMARY JUDGMENT ARE TO BE CONSTRUED LIBERALLY, WHEREAS PAPERS FILED IN SUPPORT OF A MOTION FOR SUMMARY JUDGMENT ARE TO BE STRICTLY CONSTRUED. *Pupko v. Bank of America*, (1981) 114 Cal. App. 3d 495; 170 Cal. Rptr. 615; *Calva v. Security Pacific Bank*, (1980) 111 Cal. App. 3d 409; 168 Cal. Rptr. 582

In a leading case on the propriety of the summary judgment procedure, *Stationers Corporation v. Dunn and Bradstreet, Inc.*, 62 Cal.2d 412 (1965), the California Supreme Court stated:

“Summary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his favor, and his opponent does not by affidavit show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue. The aim of the procedure is to discover, through the media of affidavits, whether the parties possess evidence requiring the weighing procedure of a trial. In examining the sufficiency of affidavits filed in connection with the motion, the affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. Such summary procedure is drastic and should be used with caution so that it does not become a substitute for the ~~open~~ trial method of determining facts.”

In the case of *Collins v. City and County of San Francisco*, 50 Cal.App.3d 671 (1975), the court stated:

“In resolving the question on defendant’s motion for summary judgment, whether there are any factual is-

sues to be tried, the superior court is obliged to construe the defendant's affidavit strictly and those of the plaintiff liberally to the end that the latter not be summarily deprived of the full hearing which he is due at the trial of this case."

IV

MOVING PARTY'S PAPERS ARE TO BE STRICTLY CONSTRUED AND IN THE CASE OF DOUBT SUMMARY JUDGMENT MOTION SHOULD BE DENIED. *Sesma v. Cueto*, (1982) 129 Cal. App. 3d 108; 181 Cal. Rptr. 12

V

ANY DOUBT AS TO THE PROPRIETY OF A MOTION FOR SUMMARY JUDGMENT SHOULD BE RESOLVED IN FAVOR OF THE OPPOSING PARTY. *Wefiero v. American Employers Insurance Company*, 5 Cal. App. 3d 799 (1970); *Joslin v. Marin Municipal Water District*, 67 Cal. 2d 132

VI

EVIDENCE IN SUPPORT OF SUMMARY JUDGMENT MAY INCLUDE INFERENCES REASONABLY DEDUCIBLE FROM PAPERS SUBMITTED UNLESS THEY ARE CONTRADICTED BY OTHER INFERENCES WHICH RAISE A TRIABLE ISSUE OF FACT. *C.C.P.* § 437(c); *Burke v. Superior Court of Sacramento County*, (1982) 180 Cal. Rptr. 537; 128 Cal. App. 3d 661

As such, plaintiff respectfully requests that the court deny defendant's motion for summary judgment and summary adjudication of the issues in its entirety, at least until such time as the plaintiff can adequately and accurately determine, by and through the aforementioned

potential defendants, the extent of involvement of defendant, FORD MOTOR COMPANY, in the design, manufacture or decision to implement the particular seat and/or seat restraint system found in the subject vehicle. As the complaint in this action was filed only six months ago, plaintiff is still in the early stages of discovery. In an effort to determine the truly liable parties in this action plaintiff needs additional time before proceeding further with this lawsuit. To allow the plaintiff to conduct additional discovery before naming the above-mentioned potential defendants and thereafter conducting further discovery against these parties to determine their involvement as well as the involvement of FORD MOTOR COMPANY with regard to the defective component parts, is fair and just and not prejudicial to the defendant, FORD MOTOR COMPANY, at this time.

DATED: August 6, 1984

Respectfully submitted,
GREENE, O'REILLY, AGNEW
& BROILLET

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Attorneys for Plaintiff,
GARY BRYANT

DECLARATION OF TIMOTHY J. WHEELER

I, Timothy J. Wheeler, declare and say that:

I am an attorney at law duly licensed to practice before all the courts of the State of California and am a member of the law firm of Greene, O'Reilly, Agnew & Broillet, attorneys of record for the plaintiff herein.

I am the attorney at said law firm principally responsible for the handling of the case of *Gary Bryant v. Ford Motor Company, a corporation*, and as such I am familiar with the matters involved in this case.

This accident arises out of a single vehicle accident which occurred on March 1, 1983. As a result of this accident, plaintiff has suffered severe and permanent personal injuries. As a result of the implementation of an improperly designed and manufactured seat and seat restraining system into the subject vehicle, the plaintiff sustained bodily injuries necessitating five major surgeries, rendering him permanently and totally disabled.

At the present time, defendant, FORD MOTOR COMPANY, is attempting to obtain summary judgment on the grounds that

(a) Ford manufactured only the chassis of the subject vehicle;

(b) Ford has no involvement with the manufacture of the body of the subject vehicle or the restraint system implemented therein;

(c) Ford had no involvement with the manufacture of the body of the subject vehicle or the driver's seat implemented therein;

(d) Ford cannot be held liable under theories of negligence, strict liability or breach of warranty for a defective product and its component parts which it did not design or manufacture.

As previously stated in plaintiff's memorandum of points and authorities, substantial controversy as to sev-

eral issues of material fact exist as to FORD MOTOR COMPANY and their involvement in the design, manufacture and/or implementation of the defective seat and/or seat restraint system.

As the designer and manufacturer of the chassis of the subject vehicle, it has yet to be determined whether or not Ford provided consultation or design specifications to subsequent purchasers of the chassis for the implementation of not only the seat and seat restraint system but also other component parts. Until such time as plaintiff is adequately able to determine the proper additional defendants in this lawsuit, plaintiff is unable to determine the exact extent of Ford's liability in this lawsuit. Based upon plaintiff's own discovery and investigation, plaintiff has determined that there are other viable entities to be brought into this matter, and until such time as these parties have been served and provide plaintiff with information and documentation, will plaintiff be able to determine the exact extent of FORD MOTOR COMPANY's liability in this action. Ford has been unable to provide plaintiff with the necessary documentation to exonerate itself. As stated in its responses to plaintiff's interrogatories, Ford destroyed all documentation with regard to the subject chassis in 1978. The only documentation which this defendant relies on to exonerate itself of liability in this action is the declaration of its own designer, James I. Scott.

This declarant has actively pursued discovery and investigation in this matter since before the complaint in this action was even filed. FORD MOTOR COMPANY has been very cooperative to date, however has been un-

able to provide plaintiff with the information necessary to determine the exact extent of Ford's involvement in this matter. Plaintiff's employer, United Parcel Service, has also been cooperative in supplying records and information with regard to the plaintiff as well as the identification of the subject vehicle. However, U.P.S. has not provided information which would inform the plaintiff as to the installation of the seat and/or seat restraining system. Apparently, this information will have to be determined from other sources, including but not limited to City Ford Company, General Seat and Sash Company and Grumman. At the present time, plaintiff intends to make its motion to remand this matter to the Superior Court of California as documentation and information in plaintiff's possession indicates that City Ford Company and Grumman, both California-based corporations, are partially liable for injuries sustained by the plaintiff as a result of this accident.

Until such time as these potential defendants are able to respond to plaintiff's complaint as well as plaintiff's discovery will anyone be able to determine the exact extent of Ford's liability in this matter.

As such, the plaintiff respectfully requests that the court deny defendant's motion for summary judgment and summary adjudication of issues in its entirety, and that the defendant take nothing thereby.

DATED: August 6, 1984

GREENE, O'REILLY, AGNEW
& BROILLET

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Declarant

EXHIBIT "A"

[Answers and Objections of Ford Motor Company to
Interrogatories Propounded by Plaintiff,
see at pp. 71-84.]

EXHIBIT "B"

McCUTCHEN, BLACK, VERLEGER & SHEA
COUNSELORS AT LAW
600 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90017
TELEPHONE (213) 624-2400

TELEX: 698261

June 29, 1984

(Received July 2, 1984)

Timothy J. Wheeler, Esquire
Greene, O'Reilly, Agnew & Broillet
1122 Wilshire Boulevard
Los Angeles, California 90017-1993

Re: *Bryant v. Ford Motor Company*

Dear Mr. Wheeler:

This will serve to respond to your letter of June 21 regarding the answers and objections of Ford Motor Company to plaintiff's first set of interrogatories.

As a preliminary matter, we believe that all objections are well taken. Each particular objection was interposed in good faith based upon the nature of the underlying interrogatory. Many interrogatories in our judgment are ambiguous, susceptible to different interpretations, unreasonably burdensome and/or request information which is irrelevant to this lawsuit. To the extent there was some reasonable basis for providing an answer to an objectionable question, we prepared a response based upon our understanding of the interrogatory. While reasonable minds may differ as to clarity and scope of interrogatories, we find no basis for the withdrawal of any objection.

Although we will fully cooperate in attempting to resolve your apparent dissatisfaction with the answers, the responses are in our view entirely adequate. In many instances, you are seeking information which was either not requested or is simply not available from Ford. Interrogatory no. 3, for example, asks who was ever in possession of the subject vehicle from the time it was sold by Ford to the present. Although you apparently concede that Ford did not sell the vehicle and would not know the identity of the vehicle owners, it is now claimed that the interrogatory should be interpreted to include only the purchaser of the chassis. While that is not the question, we would explain that Ford does not retain such vehicle records beyond ten years and therefore cannot determine who purchased the chassis and then manufactured and assembled the finished vehicle. We suggest that the seller of the vehicle can most reasonably be ascertained from the reported purchaser, United Parcel Service.

Your difficulty with our response to interrogatory no. 4 raises a similar problem. Since Ford did not design, manufacture or assemble the subject vehicle after it sold the chassis, it has no direct knowledge concerning its particular identification. Again, such information can best be determined from UPS or the manufacturer of the vehicle. Although we attempted to confirm the serial number normally imprinted on the chassis at the preliminary inspection on May 10, that number was not detectable without disassembling the vehicle. Ford's only direct information concerning the identity of any component related to the subject chassis is the general series number which, as explained in our interrogatory response, is P-500.

Despite your assertion that interrogatory no. 5 is "clear and concise," the question remains objectionable. Plaintiff has not provided any definition of the terms "safety value or safety function" and they are susceptible to a wide range of meanings. To suggest that "perhaps a design engineer" would understand the terms is at best speculative. Several other interrogatories raise the same problem. *See, e.g.*, interrogatory no. 6 ("safety of the operator"), no. 10 ("component parts . . . which were in-

tended to have a safety function or safety value'') and no. 13 ('tests [which] concern the safety of operators or users').

Beyond any problem encountered in attempting to define safety and assuming that Ford was involved only with the design and assembly of certain component parts of the chassis, interrogatory no. 5 also lacks any focus or specificity as to which particular components form the subject matter of this action. We do not believe that Ford should be required to analyze each and every chassis component to determine its possible "safety function" and then determine whether there are any patents covering such components. To attempt to include the entirety of the chassis is impermissible, particularly in view of plaintiff's liability theories which are focused only on the restraint system and driver's seat. Such questions appear more appropriately addressed to the manufacturer of the finished vehicle.

In addition to the problem of interrogatory no. 7 again focusing upon the "subject vehicle," we believe that the question is patently overbroad by requesting the identity of each person who may have "participated in a supervisory way in the design, assembly and/or manufacture" of the chassis. Other questions are similarly overbroad. *See, e.g.*, interrogatory no. 10 ("all persons . . . who participated in the actual design of . . . any of the component parts of the subject vehicle."). Beyond the burden that plaintiff is attempting to impose and despite the fact that it may in any event be impossible to reconstruct the identity of such individuals who were employed at the Michigan truck assembly plant in 1968, the question is wholly inconsistent with plaintiff's liability theories. As stated in response to interrogatory no. 20, Ford was not involved with the manufacture of the restraint system.

The information requested by interrogatory no. 8 ("current chief of product design") is meaningless unless plaintiff specifies the particular area of automotive design. The interrogatory also fails to specify which component is encompassed by the question. Moreover, even if plaintiff

limited the inquiry to the chassis, how is such information "very relevant" to this action? Ford did not design, manufacture or assemble the body of the subject vehicle, including the restraint system or driver's seat. This is again an area of inquiry which appears more appropriate for the designer and manufacturer of the finished vehicle.

Interrogatory no. 12 improperly assumes that Ford sold the subject vehicle. It did not. You are asking Ford to make a clearly erroneous assumption and then provide an answer. The answer is entirely responsive to the question. As with other interrogatories and based upon plaintiff's liability theories, this question appears better designed for the manufacturer and seller of the finished vehicle.

I appreciate your willingness to cooperate in attempting to resolve the matter. If you would care to further explore the subject, please contact me to schedule a meeting pursuant to local rule 7.15.

Very truly yours,

Richard A. Goette
of McCUTCHEN, BLACK, VERLEGER & SHEA

EXHIBIT "C"

WELLS & BARBER
LAWYERS

1600 North Broadway Suite 601
Santa Ana, California 92706
(714) 667-0201

Virgil R. Wells
Donald W. Barber
W. Walter Livingston
Victor A. Schulte
J. Norman Thibault
Kurt A. Stiefler

Los Angeles County Office:
1540 Wilshire Boulevard
Los Angeles, Ca. 90017
(213) 483-7491

May 23, 1984

GREENE, O'REILLY, AGNEW & BROILLET
1122 Wilshire Boulevard
Los Angeles, California 90017-1993

Attention: Timothy J. Wheeler, Esq.

RE: GARY BRYANT v. UNITED PARCEL
SERVICE
WCAB CASE NO.: 83 SD 78244

Dear Mr. Wheeler:

Pursuant to our earlier discussions, we are enclosing the repair history record of the subject United Parcel vehicle.

It is our understanding that the informal inspection went forward as arranged May 10, 1984 in San Marcos. The vehicle description has been confirmed as follows:

California License Number 1P09925;

I.D. # P50BLD59493

Vehicle Type 1968 Ford U.P.S. Car No. 13603

We are seeking any available additional documentation, such as title documents, purchase records and records of specifications and installers (particularly regarding the seat restraints).

We will advise of our progress with respect to this informal discovery. Thank you for your courtesy and cooperation.

Sincerely,

/s/ J.N. THIBAUT

J.N. THIBAUT

JNT/sr

Enclosure

cc: McCUTCHEN, BLACK, VERIEGER & SHEA
600 Wilshire Blvd., 10th Floor
Los Angeles, California 90017

EXHIBIT "D"

WELLS & BARBER
LAWYERS

1600 North Broadway Suite 601
Santa Ana, California 92706
(714) 667-0201

Virgil R. Wells
Donald W. Barber
W. Walter Livingston
Victor A. Schulte
J. Norman Thibault
Kurt A. Stiefler

Los Angeles County Office:
1540 Wilshire Boulevard
Los Angeles, Ca. 90017
(213) 483-7491

July 9, 1984

Timothy J. Wheeler, Esq.
GREENE, O'REILLY, AGNEW & BROILLET
1122 Wilshire Boulevard
Los Angeles, California 90017-1993

RE: GARY BRYANT v. FORD MOTOR COMPANY

Dear Mr. Wheeler:

We had inquiries pending regarding the information requested in your letter of July 2.

Enclosed are the detailed specifications regarding the subject vehicle. Some of the documentation in connection with purchase was turned over to the DMV at the time of registration, and destroyed by them after four years.

You will note these materials indicate the subject vehicle was purchased from the City Ford Company in Los Angeles on or about May 31, 1968. Perhaps additional documentation regarding manufacturers and sub-installers is in their records.

Sincerely,

/s/ J.N. THIBAUT

J.N. THIBAUT

JNT/sr

CC: McCUTCHEN, BLACK, VERIEGER & SHEA

(Proof of service omitted in printing)

HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, California 90017
(213) 624-2400

Attorneys for Defendant
Ford Motor Company

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(Caption omitted in printing)

No. 84 2049 PAR (Mex)

Date: August 20, 1984

Time: 10:00 a.m.

REPLY MEMORANDUM OF
FORD MOTOR COMPANY IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT
AND SUMMARY ADJUDICATION OF ISSUES

(Filed August 15, 1984)

I. PRELIMINARY STATEMENT

Plaintiff's belated opposition to the pending motion for summary judgment entirely fails to adequately or directly address the evidence presented by Ford Motor Company. Plaintiff seeks only to disguise the frailty of his claims against Ford by struggling to create triable issues of fact. There are none. There is no factual or legal basis for the claims against Ford and none of the evidence is disturbed or indeed even considered by plaintiff.

Instead, plaintiff's brief extends an invitation for this Court to delve into issues concerning, among other things, the anticipated discovery of nonexistent documents, the

joinder of parties other than Ford who may be responsible for plaintiff's injuries and a threatened attempt to remand this action to state court based upon the addition of possibly nondiverse parties. At best, plaintiff's invitation to explore these irrelevant issues is a diversionary tactic. By failing to address either the pertinent facts or the applicable law, plaintiff simply concedes the pending motion. There is a single pivotal issue here raised—should Ford be held legally accountable for plaintiff's injuries? Plaintiff's opposition fails to address that question and simply serves to confirm that the answer is "no."

The inescapable fact remains that there is no evidence in this action to remotely support plaintiff's claims against Ford. The facts and law are conclusively aligned against plaintiff and there is no rational reason not to grant the motion for summary judgment.

II. THIS COURT MUST ENTER SUMMARY JUDGMENT IN FAVOR OF FORD

A. *Plaintiff Concedes Ford's Motion by Failing to Controvert the Facts*

Ford's motion set forth sufficient evidence to require summary judgment on each of plaintiff's claims for relief premised upon negligence, breach of warranty and strict liability. Plaintiff attempts to escape this conclusion by advancing unsupported allegations as to what additional evidence may somehow establish concerning Ford's possible involvement in plaintiff's accident. Plaintiff then contends that it is "premature" to grant Ford's motion. (Opp. mem. p. 5.) The evidence, however, remains uncontroverted and shows the following:

1) The plaintiff is contending that he was injured in a single vehicle accident involving a 1968 truck owned by his employer, United Parcel Service, on March 1, 1983. Plaintiff claims that his injuries were caused directly and only by a defectively designed seat belt system and driver's seat in that vehicle.

2) Ford designed and manufactured *only* certain component parts associated with the chassis of the subject vehicle. That chassis has been identified as one of the P-500 series which Ford built between the late 1940's and 1979. Ford had no involvement whatsoever with the seat belt system or driver's seat in the completed vehicle.

3) Ford never provided any seat belt system or seat with any P-500 chassis and in fact relied entirely upon the manufacturer of the completed vehicle to select and install the type of vehicle body and interior, including the seat belt system and driver's seat.

Plaintiff's opposition attempts only to confuse this uncontested evidence. It is claimed, for example, that by designing the chassis, Ford somehow "provided the basic design principles for the subject vehicle in its entirety." (Opp. Mem., p. 7.) Beyond being demonstrated plainly wrong by the evidence, plaintiff relies upon that erroneous assertion to remarkably argue that "[i]t is *possible* that Ford provided design specifications and/or consultation to subsequent purchasers of their chassis for implementation of the seats and seat restraint system." (*Id.*, emphasis added.) Plaintiff's fanciful speculation is wholly unsupported by any evidence. To the contrary, the unchallenged affidavit of James I. Scott directly refutes plaintiff's hypothesis by explaining that Ford "never

designed, manufactured or assembled seats or seat belt systems for the P-500 chassis" (Scott affidavit, ¶ 8) and relied "entirely" upon the manufacturer of the completed vehicle. (Scott affidavit, ¶ 9.)

Since plaintiff's opposition fails to offer even one scrap of evidence on any point, the uncontradicted facts must be taken as true and Ford's motion must be granted. It is black letter law that a party cannot rely on bare allegations or unsupported assertions to refute a factual showing on summary judgment. *See Fed. R. Civ. Pro. 56(e)*. As the Ninth Circuit stated in *Turner v. Local Union No. 302*, 604 F.2d 1219 (9th Cir. 1979):

"When a movant submits an adequately supported motion for summary judgment, 'the burden of proof falls to the opposing party, *who must come forward with facts, and not allegations*, to controvert the moving party's case.' 'It is his duty to expose the existence of a genuine issue which will prevent the trial from being a useless formality.'"

Id. at 1228 (emphasis added; citations omitted).

Accord, THI-Hawaii v. First Commerce Financial Corp., 627 F.2d 991, 994 (9th Cir. 1980) ("Once the moving party has met the initial burden of going forward, the opposing party may not defeat summary judgment in the absence of any significant probative evidence tending to support his or her theory"); *British Airways Board v. Boeing Co.*, 585 F.2d 946, 950-51 (9th Cir. 1978).

Plaintiff has failed to meet his burden to introduce facts upon which the pending motion should or could be denied.

B. Plaintiff's Discussion of "Issues" is Wholly Irrelevant

The only matters which plaintiff does discuss in his opposition brief often have little to do with the pending motion. Plaintiff persists in outlining his contentions relating to the merits of this action and the possible involvement of Ford without addressing the evidence. The basic contention contained in plaintiff's opposition is illuminating.

"It is the contention of the plaintiff at this time that there is insufficient documentation or information available to the plaintiff to make an accurate determination as to the degree of involvement of Ford in the design, manufacture and/or implementation of the seating system as well as the seat restraint system found in the subject vehicle at the time of the accident."

(Opp. Mem. p. 4.)

This contention has been rendered utterly meaningless by the pending motion.

As a preliminary matter, Ford has clearly established that it maintains no vehicle records beyond ten years. (Scott affidavit, ¶ 13.) While one may question how any records maintained by Ford could be useful to plaintiff in this action, the uncontradicted record substantiates that no relevant information is in the possession or control of Ford. Plaintiff has moreover failed to show what "documentation or information" could conceivably be in the possession of Ford that could affect this motion. There is most certainly no information which could implicate Ford in the design or assembly of the vehicle components which plaintiff claims are defective.

We reiterate that the unchallenged affidavit of Mr. Scott unambiguously explains that Ford never designed, manufactured or assembled any seat belt system or seats for this particular type of chassis. (Scott affidavit, ¶ 8.) Ford provided only the incomplete chassis unit; the builder of the completed vehicle was responsible for the selections and installation of such equipment. Such decisions are in fact exclusively within the control of the chassis purchaser who decides upon the type of vehicle body and interior. (Scott affidavit, ¶ 8.) While plaintiff may somehow believe that other "documentation" is necessary to exonerate Ford, the affidavit supporting Ford's motion is more than sufficient to demonstrate that plaintiff has failed to establish any genuine issue.

In realizing that the evidence cannot be contradicted, plaintiff next attempts to demonstrate that some other entity may be responsible for plaintiff's injuries. It is asserted, for example, that a Pennsylvania corporation may have implemented the seating system. (Opp. mem., p. 5.) Plaintiff then states that he "suspects" that the seat restraint system and the vehicle body were manufactured by California corporations. (Opp. mem., p. 6.) Plaintiff concedes that he has not named these entities in this action but suggests that his failure to do so is somehow relevant to Ford's motion. It is not. Plaintiff's problematic addition of these parties and the threatened attempt to remand this action to state court are irrelevant and should not be considered by this Court.

These separate matters do not and cannot have any bearing upon the evidence supporting Ford's motion. As explained below, if plaintiff is attempting to create issues

to justify a request for additional time, such an attempt is unavailing.

C. There is No Justification for Further Discovery by Plaintiff to Delay the Granting of Ford's Motion

In a last plea to avoid the granting of Ford's motion, plaintiff argues that he "has been left with no alternative but to conduct discovery to determine who in fact did take part in the design, manufacture and implementation of the defective component parts." (Opp. Mem. p. 5.) He then concludes that it is "far too premature" to grant the motion. (Opp. Mem. p. 7.) This contention is no basis for denying Ford's motion and plaintiff's anticipated course of action is immaterial.

While it is sometimes difficult to understand the grounds for plaintiff's opposition, it appears that he is requesting further discovery under Rule 56(f) of the Federal Rules of Civil Procedure. However, that rule does not provide any legitimate reason for the denial of Ford's motion. The nature of plaintiff's burden under that rule was adequately explained in *Willmar Poultry Co. v. Morton-Norwich Products Inc.*, 520 F.2d 289 (8th Cir. 1975), *cert. denied* 424 U.S. 915 (1976).

"Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. A party invoking its protections must do so in good faith in affirmatively demonstrating why he cannot respond to a movant's affidavits as otherwise required by Rule 56(e) and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the mov-

ant's showing of the absence of a genuine issue of fact. Where, as here, a party fails to carry his burden under Rule 56(f), postponement of a ruling on a motion for summary judgment is unjustified."

520 F.2d at 297 (citations omitted).

Plaintiff here has similarly failed to show how any delay could possibly support a claim against Ford.

Plaintiff moreover does not offer any explanation as to why any further discovery should affect Ford's motion. Discovery of nonexistent records from Ford cannot alter plaintiff's own contentions or the established fact that Ford has no responsibility for plaintiff's injuries. See *Simons v. Amerado Hess Corp.*, 619 F.2d 440, 442 (5th Cir. 1980) ("Since defendant . . . was entitled to judgment as a matter of law based upon undisputed facts developed at least in part from plaintiff's own deposition, the argument that summary judgment was premature because plaintiff had no opportunity to complete his discovery must fail."); *Lamb's Patio Theatre v. Universal Film Exchanges*, 582 F.2d 1068, 1071 (7th Cir. 1978) ("[Plaintiff] also contends that under Rule 56(f) of the Federal Rules of Civil Procedure, summary judgment should not have been entered because it prevented [plaintiff] from pursuing additional discovery. We find this contention to be devoid of merit."). Finally, plaintiff's failure to even move for a continuance under Rule 56(f) prevents him from complaining of the timing of this motion. See *THI-Hawaii v. First Commerce Financial Corp.*, *supra.*, at 994.

The proceedings in this case during the past several months have been expensive and there is no justification for further prolonging this case against Ford. The engi-

neering analysis of the subject vehicle, the discovery relating to plaintiff's contentions and the pending motion have all been time-consuming and costly for Ford. To suggest that Ford should be further dragged through this case to somehow facilitate plaintiff's imaginary discovery is indeed unsupportable. To conclude, as plaintiff does, that to continue this action against Ford "is fair and just and not prejudicial" (Opp. memo. p. 11), is preposterous.

III. CONCLUSION

Plaintiff's three causes of action and therefore his entire action against Ford must be dismissed as a matter of law. This has already been an expensive case for Ford and we urge this Court not to postpone the entry of a final judgment. There is not evidence whatsoever to implicate Ford in the underlying accident or for the injuries allegedly sustained by plaintiff.

Dated: August 15, 1984.

Respectfully submitted,

HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK,
VERLEGER & SHEA

/s/ Richard A. Goette
Richard A. Goette
Attorneys for Defendant
Ford Motor Company

(Proof of service omitted in printing)

(SPACE BELOW FOR FILING STAMP ONLY)

LAW OFFICES OF
GREENE, O'REILLY, AGNEW & BROILLET
1122 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90017-1993
(213) 482-1122
(213) 482-1350

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

CASE NO. C 84 2049 PAR (mex)

NOTICE OF TAKING DEPOSITION
(RECORDS ONLY, NO APPEARANCE NECESSARY)

TO ALL PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the deposition of the CUSTODIAN OF RECORDS OF CITY FORD COMPANY, will be taken on September 12, 1984, at 10:00 a.m., in the law offices of Greene, O'Reilly, Agnew & Broillet, located at 1122 Wilshire Blvd., Los Angeles, CA, before a Notary Public in and for Los Angeles County, CA, as may be present at said time and place.

In lieu of appearance, said CUSTODIAN OF RECORDS OF CITY FORD COMPANY may produce in the above-named law offices the documents and other tangible things described in the attached deposition subpoena to testify or produce documents or things on or before the date and time noticed for production.

DATED: August 17, 1984

GREENE, O'REILLY, AGNEW
& BROILLET

By: /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Attorneys for Plaintiff,
GARY BRYANT

NAME, ADDRESS AND TELEPHONE NUMBER
OF ATTORNEY(S)

GREENE, O'REILLY, AGNEW & BROILLET
1122 Wilshire Blvd.
Los Angeles, CA 90017 (213) 482-1122

ATTORNEY(S) FOR
Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

CASE NUMBER CV 84 2049 PAR (Mex)

DEPOSITION SUBPOENA TO TESTIFY
OR PRODUCE DOCUMENTS OR THINGS

TO: CUSTODIAN OF RECORDS OF CITY FORD
COMPANY

YOU ARE COMMANDED to appear at 1122 Wilshire Blvd., Los Angeles, CA (Street address) on September 12, 1984 at 10:00 a.m. o'clock a.m. to testify on behalf of CITY FORD COMPANY at the taking of a deposition in the above-entitled action pending in the United States District Court for the Central District of California and bring with you:

(Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things in which case the documents and things should be designated in the space provided below.)

all documents, writings, reports, design plans and specifications, or any other material pertaining to that certain 1968 Ford P-500 chassis with a model P-600 U.P.S. body bearing U.P.S. car number 18603

(see attached declaration of Timothy J. Wheeler)

DATED _____ LEONARD A. BROSNAN,
CLERK

BY _____
Deputy Clerk

NOTE: *Any subpoenaed organization not a party to this suit is hereby admonished pursuant to Rule 30(b)(6), F.R. Civ.P.: to file a designation with the Court specifying one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which he will testify or produce documents or things. The persons so designated shall testify as to matters known or reasonably available to the organization.*

DECLARATION OF TIMOTHY J. WHEELER

I, Timothy J. Wheeler, declare and say that:

I am an attorney at law duly licensed to practice before all the courts of the State of California, and am a member of the law firm of Greene, O'Reilly, Agnew & Broillet, plaintiff's counsel in this matter.

The documents requested in the application for subpoena duces tecum are material to the issues in this case and good cause exists for the production of said documents by reason of the following facts.

This is an action for severe personal injuries arising out of an accident that occurred on March 1, 1983. At the

time of the accident, a 1968 Ford P-500 parcel van owned and operated by United Parcel Service veered out of control, crashing and subsequently injuring the plaintiff driver, Gary Bryant.

Discovery and investigation have informed the plaintiff that the chassis of the subject vehicle was manufactured by Ford, however the designers and manufacturers of the seat as well as the seat restraint systems are unknown to the plaintiff at this time. Further investigation and discovery have revealed that the subject vehicle was purchased from City Ford Company, 1800 Pasadena Avenue, Los Angeles, CA, on or about May 31, 1968.

At the present time, plaintiff is making every effort to ascertain all necessary defendants in this matter, particularly the names of the designers and manufacturers of the seat and seat restraint system. Plaintiff believes that the receipt and distribution records, as well as all of the records requested in this subpoena duces tecum, will reflect the names of all persons or entities who participated in the design, manufacture, assembly and distribution of the subject vehicle and its component parts.

The complaint and answer in this matter raise the issue of liability for the accident, and the records requested for production are material to said issue.

Said records are the only original source of the information requested.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of August, 1984, at Los Angeles, California.

GREENE, O'REILLY, AGNEW
& BROILLET

By: /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Declarant

(Proof of service omitted in printing)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE PAMELA ANN RYMER, JUDGE
PRESIDING

(Caption omitted in printing)) NO. CV 84-2049-PAR
)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
MONDAY, AUGUST 20, 1984

ELAINE J. COHEN, CSR 2706
OFFICIAL COURT REPORTER
442-A UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012
(213) 680-1639

APPEARANCES:

FOR THE PLAINTIFF:

GREEN, O'REILLY, BROILLET, PAUL,
SIMON, MCMILLAN, WHEELER & ROSENBERG
BY: JOHN SUTHERLAND
816 SOUTH FIGUEROA STREET
LOS ANGELES, CALIFORNIA 90017-2516
(2L3) 482-1122

FOR THE DEFENDANT:

MCCUTCHEN, BLACK, VERLEGER & SHEA
BY: RICHARD A. GOETTE
600 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90017
(213) 624-2400

LOS ANGELES, CALIFORNIA; MONDAY, AUGUST 20, 1984; 10:00 AM

THE CLERK: Item 17, Civil 84-2049, Gary Bryant versus Ford Motor Company.

Counsel, your appearances, please.

MR. GOETTE: Good morning, your Honor. Richard Goette of McCutchen, Black, Verleger & Shea on behalf of defendant Ford Motor Company, the moving party.

MR. SUTHERLAND: Good morning, your Honor. John Sutherland of Green, O'Reilly, et al., appearing on behalf of the plaintiff.

THE COURT: The ball is in your court.

MR. SUTHERLAND: May it please the court, I had a feeling it was.

Your Honor, I'd like to address a few points in the court's tentative. To begin with, I think that perhaps the theme of the case, if there has been one, is one of records which are difficult to obtain, hard to find and in fact which are difficult to ascertain. We know that the Ford Motor Company from its own statements manufactured the basic vehicle. We do not know, because we have been unable to determine to whom that vehicle was sold, precisely what input the Ford Motor Company had into the design of the finished vehicle, precisely whether the subject vehicle was finally sold as a Ford vehicle, precisely and under what circumstances the various internal components of the vehicle were added by equipment suppliers.

I would respectfully assert to the court that active discovery has been done with regard to this point, such discovery, including inspections of the vehicle, which have

not even proved sufficient for Ford Motor Company to determine who manufactured the internal components, extensive—informal but extensive contact with the plaintiff's employer, owner of the vehicle, which has finally disclosed the possibility, but not certainty, of the probable seller of the vehicle.

Now, as the court has pointed out under its rules, for us to at this point attempt at the last moment to bring in a nondiversity defendant might be improper, but I would propose to your Honor that it is not improper to permit the plaintiff under the rules of this court additional time to do certain discovery so that the precise nature of the involvement of the Ford Motor Company, whose own records have been destroyed under its normal records destruction proceedings, to determine precisely what involvement the Ford Motor Company had with the subject vehicle.

We have shown a basic manufacturing connection, but because at least in part of Ford's own document procedures we have been unable up to the present time to prove precisely what input into the manufacturing of the subject vehicle the Ford Motor Company had.

Now, in this recently filed case, a second concern that I have is procedurally nothing be done to compromise the rights of the plaintiff with the convenience of this court to bring in such additional parties as are necessary who may be discovered through further inquiry to the plaintiff's employer through leads that the plaintiff's employer has given to the plaintiff, to permit further parties properly to be brought before this court for the adjudication of the questioned liability of the most serious

injuries that the plaintiff has suffered, and I'd be happy to address any questions that the court might have with regard to these points.

THE COURT: Well, I just do not believe that a showing for further discovery or for a continuance motion pending further discovery is sufficient. It seems to me that it is just a real speculative venture and there isn't the kind of showing that discovery of third parties would show any connection whatsoever between Ford and the parts which you say are defective. The record seems very clear that Ford is entitled to summary judgment based upon the lack of any genuine dispute over material facts, and so I'm going to rule in accordance with the tentative.

Mr. Sutherland: Can this be done in such a fashion that it does not compromise the right of the plaintiff to bring in such other further parties as the United Parcel Service may disclose to it?

THE COURT: Well, I'm going to grant the motion for summary judgment.

Mr. Goette?

MR. GOETTE: Yes, your Honor. That issue obviously is not before the court. The single issue presented by this motion is whether the summary judgment is properly taken. Whatever course of action the plaintiff chooses to take in the future is his own business.

THE COURT: Yes. I think that's going to be up to you. I'm just going to grant the summary judgment in accordance with the tentative.

MR. GOETTE: Thank you, your Honor.

MR. SUTHERLAND: Thank you, your Honor.

I, Elaine J. Cohen, CSR 2706, do hereby certify that the foregoing is a true and correct transcription of my stenographic notes.

Dated this — day of December 1984

/s/ Elaine J. Cohen
Elaine J. Cohen

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. CV 84-2049 PAR

Date 8/20/84

Title Gary Bryant -v- Ford Motor Co.

DOCKET ENTRY

PRESENT:

HON. PAMELA ANN RYMER, JUDGE

Linda Orona

Elaine Cohen

Deputy Clerk

Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

John Sutherland

ATTORNEYS PRESENT FOR DEFENDANTS:

Richard Goette

PROCEEDINGS: Defendant's motion for summary judgment & summary adjudication of issues.

Court issues a tentative ruling.

Counsel argue.

Court grants defendant's motion for summary judgment.

Initials of Deputy Clerk LO

Tentative Ruling

CV84-2049 Bryant v. Ford Motor Co.

Defendant's Motion for Summary Judgment

Grant Motion

This action for personal injuries arising out of an auto accident was commenced in Los Angeles County Superior Court and removed by defendant Ford Motor Co. (Ford) to this Court on the ground that complete diversity of citizenship exists between the parties and that Ford is not a citizen of California. 28 U.S.C. § 1441(b). Although Ford is the only named defendant in the complaint, plaintiff also named doe defendants. In its petition for removal,

Ford alleges that the doe defendants are sham and cannot defeat removal of this action. [Removal Petition at ¶ 7.]

After some discovery, Ford now moves for summary judgment on the ground that it did not design, assemble or manufacture the seat or the seat belt system—the components of the vehicle that plaintiff claims caused his injuries.

The following facts are not disputed:

1. Plaintiff is a California citizen and former employee of United Parcel Service, Inc., Ford Motor Co. ("Ford") is incorporated under the laws of the state of Delaware and has its principal place of business in Michigan.
2. On March 1, 1983, plaintiff was involved in a single vehicle accident which occurred while he was driving a truck owned by his employer.
3. Ford designed and assembled certain component parts of the chassis (Model No. P-500) of the vehicle driven by plaintiff at the time of the accident.
4. Ford did not design or assemble the seat belt system or seats in the vehicle driven by plaintiff.

Issues Raised by Summary Judgment Motion

1. Is there any evidence that connects Ford to the allegedly defective seat and/or seat belt system?
2. Should plaintiff be permitted to conduct additional discovery?
3. Does the possible existence of non-diverse defendants who have not been named destroy the subject-matter jurisdiction of this court?

No Evidence Has Been Adduced that Connects Ford to the Seats or Seat Belt System.

Ford has submitted evidence in the form of an affidavit by James Scott in which Mr. Scott, a 28-year employee of Ford, states that Ford only designed and assembled the P-500 chassis and did not design, manufacture or assemble the seat or seat belt system for the vehicle which was involved in the accident. The chassis of the vehicle driven by plaintiff was built at the Michigan truck assembly plant in July, 1982 according to the vehicle identification number. However, because Ford does not retain sales records and other possibly relevant documents, it can submit no documentary evidence to confirm Mr. Scott's statements.

Plaintiff admits that he has no evidence at this time that connects Ford with the allegedly defective seats and seat belt system. Plaintiff argues that the lack of evidence precludes summary judgment. In his statement of genuine issues of material fact, plaintiff speculates whether Ford provided specifications, plans, consultation services or financial support to the person or persons who purchased the Ford chassis upon which the subject vehicle was built. The Scott testimony would support the inference that Ford was not at all involved in the design or manufacture of the seats or seat belt system. Plaintiff has not adduced any evidence that raises a genuine issue of fact. A party opposing summary judgment must present some significant probative evidence tending to support his complaint. *Compton v. Ide*, 732 F.2d 1429, 1434 (9th Cir. 1984). Accordingly, based on the record presented, the Court finds that there is no genuine issue of material fact regarding Ford's non-involvement with the design, manufacture or assembly of the seats or seat belt system or any other component of the vehicle other than the chassis.

Plaintiff Should Not Be Permitted Additional Discovery

Plaintiff appears to be requesting additional time for discovery in order to oppose defendant's motion. Federal Rule of Civil Procedure 56(f) provides that the court may refuse to rule on a summary judgment motion if it appears by way of affidavit of the party opposing the motion that he needs additional time to conduct discovery which will provide him with the facts necessary to oppose the motion. In his declaration, plaintiff's counsel does not state that discovery from third parties will demonstrate that defendant Ford is liable for plaintiff's injuries but rather that other entities are at least partially liable for the injuries. Plaintiff apparently hopes that this discovery of third parties and potential defendants may show that Ford was in some manner involved in the making or designing of the seats and seat belt system. "A vague claim of the need for additional discovery, unsupported by any basis in fact, is an insufficient ground upon which to oppose a motion for summary judgment." *R-T Leasing Corp. v. Ethyl Corp.*, 494 F.Supp. 1128, 1139 (S.D.N.Y. 1980); *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289 (9th Cir. 1975). *Securities & Exchange Comm'n v. Spence & Green Chem Co.*, 612 F.2d 896, 901 (5th Cir. 1980) ("Because the burden on a party resisting summary judgment is not a heavy one, one must conclusively justify his entitlement to the shelter of rule 56(f) by providing specific facts explaining the inability to make a substantive response as required by Rule 56(e) and by specifically demonstrating 'how postponement of a ruling on the motion will enable him, by discovery or by other means, to rebut the movant's showing of the absence of a genuine issue of fact.'") Plaintiff has not made an ade-

quate showing that discovery of third parties will reveal connections between Ford and the allegedly defective parts.

It is within the trial court's sound discretion to decide whether to grant a continuance under Rule 56(f). The inadequacy of plaintiff's showing persuades the court to deny any such request.

The unnamed potential defendants do not deprive this court of subject-matter *jurisdiction requiring* remand of the action to state court.

Although he has not made a motion to add additional parties or a motion to remand, plaintiff now apparently believes that there are California defendants who might be liable to him. It appears that plaintiff has not tried to identify a possible doe defendant until he found that his case was in trouble. The Ninth Circuit has taken the view that last minute attempts to plead in a doe defendant in order to stave off a summary judgment motion may be rejected. *Lopez v. General Motors Corp.*, 697 F.2d 1328 (9th Cir. 1983) Here plaintiff has not even made motions to add additional defendants; he mere speculates on what he may do in the future. Plaintiff has had almost five months since this action was removed to identify doe defendants and move to remand if warranted. His failure to do so justifies this Court's decision to reject his argument that summary judgment should be denied so that he may find a non-diverse doe.

It Is Therefore Ordered that defendant Ford Motor Co.'s motion for summary judgment is granted. Ford Motor Co. is entitled to summary judgment on all claims of plaintiff's complaint.

HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, California 90017
(213) 624-2400
Attorneys for Defendant
Ford Motor Company

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

No. 84 2049 PAR (Mex)

JUDGMENT

(Entered August 27, 1984)

Date: August 20, 1984

Time: 10:00 a.m.

The motion of defendant Ford Motor Company ("Ford") for summary judgment and summary adjudication of issues came on for hearing on August 20, 1984, before the Honorable Pamela A. Rymer, United States District Judge presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that:

1. The plaintiff's negligence claim as alleged in the first cause of action in the complaint herein shall be dismissed as a matter of law.

2. The plaintiff's breach of warranty claim as alleged in the second cause of action in the complaint herein shall be dismissed as a matter of law.

3. The plaintiff's strict liability claim as alleged in the third cause of action in the complaint herein shall be dismissed as a matter of law.

4. Ford is entitled to summary adjudication of the issues and dismissal of the first, second and third causes of action.

Dismissal of these causes of action shall be entered accordingly.

Dated: August 21, 1984.

/s/ Pamela Ann Rymer
Pamela Ann Rymer
United States District Judge

Law Offices of
GREENE, O'REILLY, AGNEW & BROILLET
1122 Wilshire Boulevard
Los Angeles, California 90017-1993
(213) 482-1122
(213) 482-1350
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

CASE NO. C 84 2049 PAR (mex)

NOTICE OF MOTION AND MOTION TO REMAND TO
SUPERIOR COURT; MEMORANDUM OF POINTS
AND AUTHORITIES; DECLARATION OF TIMOTHY
J. WHEELER

(Filed August 29, 1984)

Date: September 24, 1984

Time: 10:00 a.m.

PLEASE TAKE NOTICE that at 10:00 a.m. on September 24, 1984, or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Pamela A. Rymer, United States District Judge, 312 North Spring Street, Los Angeles, CA 90012, plaintiff, GARY BRYANT, will move this Court for an Order:

(a) Remanding this matter to the Superior Court of the State of California, County of Los Angeles, on the grounds that the Superior Court of the State of California is the court of proper jurisdiction in this matter and that diversity jurisdiction no longer exists, as this matter was originally removed improvidently and without knowledge of the existence of other liable parties.

This motion is based on this notice of motion, the pleadings and documents on file herein, the memorandum of points and authorities attached hereto, the declaration of Timothy J. Wheeler, and any oral argument which may be presented at the time of the hearing of this motion.

DATED: August 23, 1984

GREENE, O'REILLY, AGNEW
& BROILLET

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Attorneys for Plaintiff,
GARY BRYANT

MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

This case arises out of a single vehicle accident which occurred on or about March 1, 1983. As a result of this accident, plaintiff sustained severe and permanent bodily injury. To date, Ford Motor Company, a corporation, was the only named defendant in this action and was being prosecuted on theories of negligence, strict liability and breach of warranty. Ford Motor Company, *only*, was granted relief by summary judgment on August 20, 1984.

Since before the filing of the complaint in this action, plaintiff has conducted discovery and investigation in an effort to determine the truly liable parties responsible for plaintiff's injuries. Based on information and belief that the United Parcel Service van involved in this acci-

dent was manufactured by Ford Motor Company, plaintiff filed his complaint against Ford Motor Company and thereafter commenced formal discovery.

Since the initiation of his discovery, plaintiff has determined the names of at least three additional potential defendants, namely: General Seat and Sash, located in Tompton, Pennsylvania; Grumman-Olson Company, located in Los Angeles, California; and City Ford Company, located in Los Angeles, California. Discovery and investigation have also led plaintiff to believe that the design and manufacture of the seat restraint system found in the subject vehicle was performed by a California corporation located in Pacoima, California. However, plaintiff does not have sufficient evidence at this time to name this entity as a defendant, but intends to do so in the future should investigation warrant same.

Based on the recent discovery of at least two California companies as defendants in this matter, plaintiff requests that this court remand this matter back to the Superior Court of the State of California, Central District, where suit was initially filed.

II.

LACK OF DIVERSITY OF CITIZENSHIP WARRANTS REMAND OF THIS MATTER BY THE SUPERIOR COURT.

Title 28 U.S.C.S. § 1447(c) states in part that:

“If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case and may order the payment of just costs. . .”

In the case of *Clark v. Safeway Stores, Inc.*, (1953 DC W.D. MO) 117 F.Supp. 583, the court was faced with a situation where the original complaint had been filed in state court but the defendant had petitioned to the federal court for removal of that action based upon diversity of citizenship, and that the amount in controversy was within the jurisdiction of the court. In this case, there was no question as to the federal court's proper jurisdiction over the case. Subsequently, the plaintiff amended his complaint by joining a local defendant and thereupon filed his motion to remand upon the ground that there was no diversity of citizenship which would confer jurisdiction upon the court. The plaintiff reasoned that by the amendment the court had lost jurisdiction over the action. The defendant who had removed the action to federal court strongly resisted the motion by the plaintiff upon the grounds that the amendment was without defendant's consent. The court held that where the plaintiff had obtained leave of the federal court to file an amended complaint which joined a local defendant and which stated a joint cause of action, written consent of the adversary party was unnecessary and the case would be properly remanded to superior court.

It was also held in the case of *Roecker v. Railways Express Agency, Inc.*, (1945 DC MO.) 63 F.Supp. 5, that if after removal a complaint was amended so as to destroy diversity of citizenship, the case should have been remanded.

Plaintiff's motion for leave to file his first amended complaint will be heard concurrently with this motion. In the event that this court grants plaintiff's motion for

leave to file his first amended complaint to allow the plaintiff to name additional defendants, but not limited to Grumman-Olson Company and City Ford Company, both located in Los Angeles, California, complete diversity in this action will be destroyed. It is respectfully submitted that as there would not be complete diversity in this matter, the court's proper procedure pursuant to Title 28 U.S.C.S. § 1447(c), would be to remand this action to the appropriate state court.

III

DEFENDANT, FORD MOTOR COMPANY'S, REMOVAL OF PLAINTIFF'S ACTION WAS MADE IMPROVIDENTLY AND WITHOUT FORESIGHT.

As defined in the case of *Soam Corporation v. Trane Company*, (1980 SD NY) 506 F.Supp. 302, the term "removed improvidently" means without foresight and without providing for future events. In the case at hand, defendant, Ford Motor Company, removed plaintiff's action on March 29, 1984. A vehicle inspection of the subject vehicle did not take place by engineers of Ford Motor Company or members of this office until May 10, 1984. It was at this time that both parties discovered that Ford Motor Company manufactured the chassis of the subject vehicle, and that other component parts of the vehicle were designed and manufactured by other entities. As such, at the time of removal of plaintiff's action to the federal court, it was not known that other defendants were liable for plaintiff's injuries. It was not known until June 10, 1984, that City Ford Company was the distributor of the subject vehicle and therefore liable in part for plaintiff's

injuries. As such, the circumstances at hand fall within the definition of the term "removed improvidently," as future facts and events were not known by either party at the time of removal.

IV

CONCLUSION

For the foregoing reasons, the plaintiff respectfully requests that the court remand this action to the Superior Court of the State of California, County of Los Angeles.

DATED: August 29, 1984

Respectfully submitted,

GREENE, O'REILLY, AGNEW
& BROILLET

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Attorneys for Plaintiff,
GARY BRYANT

DECLARATION OF TIMOTHY J. WHEELER

I, Timothy J. Wheeler, declare and say that:

I am an attorney at law duly licensed to practice before all the courts of the State of California as well as the United States District Court. I am the attorney at the law offices of Greene, O'Reilly, Agnew & Broillet duly responsible for the handling of the matter of *Gary Bryant v. Ford Motor Company*, and could and would competently testify to all matters herein.

Plaintiff's initial interview with this office occurred in late November, 1983. Plaintiff's complaint in this action was filed on January 27, 1984. At that time, the

only information available to the plaintiff was that the subject United Parcel Service van involved in this accident was manufactured by Ford Motor Company. Investigation into this accident revealed that the subject United Parcel Service van was manufactured by Ford Motor Company, and therefore plaintiff subsequently filed its complaint against Ford Motor Company only. It was not until after meetings with attorneys for Ford Motor Company as well as an inspection of the subject vehicle did plaintiff realize that additional persons and entities were also responsible for the design, manufacture and implementation of the defective seat and seat restraint system which caused plaintiff's injuries.

As plaintiff has been diligent in his investigation and discovery over the past seven months, it would be highly prejudicial to the plaintiff if he was not allowed to join additional party defendants and to amend his complaint accordingly.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of August, 1984, at Los Angeles, California.

GREENE, O'REILLY, AGNEW
& BROILLET

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Declarant

Law Offices of
GREENE, O'REILLY, AGNEW & BROILLET
 1122 Wilshire Boulevard
 Los Angeles, California 90017-1993
 (213) 482-1122
 (213) 482-1350
 Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

CASE NO. C 84 2049 PAR (mex)

NOTICE OF MOTION AND MOTION

1. TO JOIN ADDITIONAL DEFENDANT PARTIES PURSUANT TO RULE 20 OF THE FEDERAL RULES OF CIVIL PROCEDURE; AND
2. FOR LEAVE TO FILE FIRST AMENDED COMPLAINT OR IN THE ALTERNATIVE TO REMAND THIS ACTION TO THE PROPER STATE COURT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF TIMOTHY J. WHEELER

(Filed August 29, 1984)

Date: September 24, 1984

Time: 10:00 a.m.

PLEASE TAKE NOTICE that at 10:00 a.m. on September 24, 1984, or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Pamela A. Rymer, United States District Judge, 312 North Spring Street, Los Angeles, CA 90012, plaintiff, GARY BRYANT, will move this Court for an Order:

(a) Joining the below-listed entities as defendants in this action on the grounds that each is a proper

party defendant, under Rule 20(a) of the *Federal Rules of Civil Procedure*;

(1) Grumman-Olson Company, located in Los Angeles, CA;

(2) City Ford Company, located in Los Angeles, CA;

(3) General Seating and Sash Company, located in Tompton, Pennsylvania;

(b) Permitting plaintiff to file an amended complaint pursuant to Rule 15 of the *Federal Rules of Civil Procedure*, on the grounds that an amendment to plaintiff's original complaint is necessary in order to state causes of action against the above-listed entities and to make them party defendants herein, or;

(c) In the alternative, plaintiff requests that this court remand this action to the proper State Court pursuant to plaintiff's motion to remand filed concurrently herein.

This motion is based on this notice of motion, the pleadings and documents on file herein, the memorandum of points and authorities attached hereto, the declaration of Timothy J. Wheeler, and any oral argument which may be presented at the time of the hearing of this motion.

DATED: August 29, 1984

GREENE, O'REILLY, AGNEW
& BROILLET

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Attorneys for Plaintiff,
GARY BRYANT

MEMORANDUM OF POINTS
AND AUTHORITIES

I

INTRODUCTION

This case arises out of a single vehicle accident which occurred on or about March 1, 1983. As a result of this accident, plaintiff sustained severe and permanent bodily injury. To date, Ford Motor Company, a corporation, was the only named defendant in this action and was being prosecuted on theories of negligence, strict liability and breach of warranty. Ford Motor Company *only*, was granted relief by summary judgment on August 20, 1984.

Since before the filing of the complaint in this action, plaintiff has conducted discovery and investigation in an effort to determine the truly liable parties responsible for plaintiff's injuries. Based on information and belief that the United Parcel Service van involved in this accident was manufactured by Ford Motor Company, plaintiff filed his complaint against Ford Motor Company and thereafter commenced formal discovery.

Since the initiation of his discovery, plaintiff has determined the names of at least three additional defendants, namely: General Seat and Sash Company located in Tomp-
ton, Pennsylvania; Grumman Olson Company located in Los Angeles, California, and City Ford Company located in Los Angeles, California.

In lieu of the above-mentioned discovery and on the memorandum of points and authorities, plaintiff requests that this court grant its order allowing the plaintiff to join additional parties and to amend his original complaint accordingly.

II

PERMISSIVE JOINDER OF PARTIES

Federal Rule of Civil Procedure No. 20 states in part:

"All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all defendants will arise in the action . . ."

Furthermore, in the cases of *Mesa Computer Utilities v. Western Union Computer Utilities, Inc.*, (1975 DC Del.) 67 FRD 634, and *Walker v. City of Houston*, (1971 DC Texas), 341 F.Supp. 1124, the courts recognized the true test necessary for joinder under Rule 20 of the *Federal Rules*. Part one of the test requires the occurrence of some question of fact or law common to all parties while the second test requires the existence of a right to relief predicated upon or arising out of a single transaction or occurrence or series of transactions.

In the case at hand, both tests are satisfied as plaintiff's injuries arise out of a single accident which occurred on March 1, 1983. Plaintiff's theories of negligence, breach of warranty and strict liability apply to those defendants, jointly and severally, who participated in the design, manufacture and/or implementation of the defective seat and seat restraint system incorporated into the United Parcel Service van which the plaintiff was driving at the time of the accident.

Plaintiff's ongoing discovery and investigation has revealed other liable defendants in this action as men-

tioned above, and therefore requests that this court allow the joinder of these defendants so that plaintiff may be compensated for his serious injuries.)

Based upon information and belief, and plaintiff's ongoing investigation, plaintiff believes Grumman-Olson Company, located in Los Angeles, California, designed and manufactured the body of the subject vehicle incorporated with the chassis designed and built by Ford Motor Company. As the designer, manufacturer and installer of the vehicle's body, plaintiff believes that Grumman-Olson Company is liable in some degree for plaintiff's injuries due to the incorporation of the defective seat and seat restraint system in the subject vehicle, as well as the placement of the seat components in the unpadded driver's compartment.

Based upon plaintiff's investigation, plaintiff discovered on June 10, 1984, by correspondence from plaintiff's employer's attorneys that City Ford Company, located in Los Angeles, California, distributed the subject vehicle and its component parts. Therefore, plaintiff believes there is liability on the part of City Ford Company as distributor of the subject vehicle and its defective component parts, and therefore should not escape liability for plaintiff's injuries. Plaintiff thereby requests that this court allow him to name City Ford Company as a defendant in this accident in an effort to expedite the final determination of the disputed liability in this action, one of the purposes of Rule 20. *Mosely v. General Motors Corporation*, (1974 C.A.8 MO) 497 F.2d 1330.

Finally, by way of investigation and discovery, plaintiff has discovered that General Seating and Sash Company, located in Tompton, Pennsylvania, designed and

manufactured the defective seat implemented with the subject vehicle, and therefore there is clear liability on behalf of this defendant warranting its joinder in this action.

Plaintiff has yet to determine the name or names of the persons or entities responsible for the design, manufacture and/or implementation of the defective seat restraint system found with the subject vehicle at the time of the accident, however plaintiff believes that this defendant is a company located in Pacoima, California. Plaintiff wishes to conduct further investigation and discovery before actually naming this entity.

As plaintiff's injuries clearly arose from a single accident, part of which was the result of the design, manufacture and implementation of a defective seat and seat restraint system in the subject vehicle, the designer, manufacturer, assembler and distributor of the defective vehicle and its component parts should be joined as defendants in this action to compensate the plaintiff for his injuries. Since this accident, plaintiff has undergone five serious back surgeries, and at the present time cannot walk, experiences severe pain and discomfort, paralysis of his right leg from his hip to his foot, and requires continuous care and attention.

III

AMENDED AND SUPPLEMENTAL PLEADINGS

Rule 15(a) of the *Federal Rules of Civil Procedure* states in part that:

“ . . . A party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . ”

The federal courts have construed Rule 15(a) liberally. In *Polin v. Dunn and Bradstreet, Inc.*, (1975 C.A. 10 Okla.) 511 F.2d 875, the court held that although a trial court has discretion in granting or denying leave to amend the complaint under Rule 15(a), leave to amend by the court is to be freely granted.

Furthermore, "The function of Rule 15 is to provide parties opportunity to assert new matters that may not have been known to them at the time they filed their original pleadings." *Johnson v. Helicopter and Airplane Services Corp.*, (1974 DC MD) 389 F.Supp. 509. In the case at hand, the plaintiff was unaware at the time he filed his complaint against Ford Motor Company that Ford did not manufacture the entire van, but only portions of it.

Plaintiff's discovery and investigation has revealed since the time of the filing of his complaint, that other party defendants are potentially liable for the severe injuries suffered by the plaintiff in this accident. City Ford Company, as distributor of the completed vehicle, General Seat and Sash Company, as designer and manufacturer of the defective seat, and Grumman-Olson Company, as designer and manufacturer of the truck body, as well as the unknown designer, manufacturer and implementer of the defective seat restraint system, are all parties which should be joined in this action. The plaintiff should not be prejudiced by not being allowed to amend his complaint to include the above-named defendants as plaintiff was unaware of their existence and involvement when he filed his complaint on January 27, 1984. Over the past seven months, plaintiff has been able to determine the existence of these parties, and thereby requests that this court allow

an amendment to his complaint to include them as defendants.

As the court well knows, in determining whether to allow plaintiff leave to amend his complaint, the court should consider any prejudice which may be caused the defendants by looking at the (1) good faith of the movant, (2) extent to which there would be undue delay by allowing such amendment, and (3) the degree to which the amendment would needlessly delay final disposition of this case. *L.D. Schreiber Cheese Company v. Clearfield Cheese Company*, (1980, WD PA) 495 F.Supp. 313. In the case at hand, there is no adverse party to consider as Ford Motor Company has been granted relief by summary judgment. The plaintiff makes this request for leave to amend its complaint in good faith, as someone is clearly liable for the injuries sustained by the plaintiff as a result of the design, manufacture and implementation of the defective seat and seat restraint system in the subject vehicle. Furthermore, granting leave to amend this complaint would not cause any undue delay nor would it delay the final disposition of this case. If the plaintiff is not allowed to name additional defendants and conduct discovery as against each of them in an effort to determine the extent of each party's liability, then it is the plaintiff who would be severely prejudiced.

Therefore, plaintiff respectfully requests that this court allow plaintiff to join the defendants named herein as additional parties to this lawsuit, and subsequently amend its complaint accordingly so as to properly name each of these defendants, or in the alternative, remand

this matter to the proper State Court pursuant to plaintiff's motion to remand filed concurrently herein.

DATED: August 29, 1984

Respectfully submitted,
GREENE, O'REILLY, AGNEW
& BROILLET

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Attorneys for Plaintiff,
GARY BRYANT

[Declaration of Timothy J. Wheeler,
signed August 29, 1984, see at pp. 142-143.]

Law Offices of
GREENE, O'REILLY, AGNEW & BROILLET
1122 Wilshire Boulevard
Los Angeles, California 90017-1993
(213) 482-1122
(213) 482-1350

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

CASE NO. C 84 2049 PAR (mex)

NOTICE OF APPEAL

TO THE CLERK OF THE ABOVE-ENTITLED
COURT:

NOTICE IS HEREBY GIVEN that plaintiff, GARY BRYANT, hereby appeals to the Federal Court of Appeal for the Ninth Circuit from this court's order granting summary judgment in this matter entered herein on August 27, 1984, in favor of the defendant, FORD MOTOR COMPANY, and against the plaintiff, GARY BRYANT, providing as follows:

See Exhibit "A" attached hereto.

NOTICE SHALL BE GIVEN to the only defendant in this matter, FORD MOTOR COMPANY, by and through its attorney of record: McKutchen, Black, Verleger & Shea, 600 Wilshire Blvd., Los Angeles, CA 90017, Attention: Richard Goette, Esq.

DATED: September 26, 1984

Respectfully submitted,

GREENE, O'REILLY, AGNEW
& BROILLET

By Timothy J. Wheeler

TIMOTHY J. WHEELER

Attorneys for Plaintiff and

Appellant, GARY BRYANT

(Proof of service omitted in printing)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No. CV 84-2049 PAR Date 9/28/84

Title Gary Bryant -v- Ford Motor Company

DOCKET ENTRY

PRESENT:

HON. PAMELA ANN RYMER, JUDGE
Linda Orona No Appearance
Deputy Clerk Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS

Not Present

ATTORNEYS PRESENT FOR DEFENDANTS:

Not Present

PROCEEDINGS:

Judgment was entered for the sole defendant in this case, Ford Motor Co., on August 27, 1984. On August 29, 1984 plaintiff filed a "motion to remand" to the State Court. Because the Court has no jurisdiction over the action except pursuant to FRCP 60(b), no action will be taken by the Court on the instant motion.

cc: counsel of record.

Initials of Deputy Clerk LO

Law Offices of

GREENE, O'REILLY, AGNEW & BROILLET

1122 Wilshire Boulevard

Los Angeles, California 90017-1993

(213) 482-1122

(213) 482-1350

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

CASE NO. C 84 2049 PAR (mex)

NOTICE OF MOTION AND MOTION FOR RELIEF
FROM JUDGMENT OF ORDER (F.R.C.P. § 60(b)) OR
IN THE ALTERNATIVE, A MOTION FOR RECON-
SIDERATION: LOCAL RULE 7.16

(Filed October 4, 1984)

Date: October 29, 1984

Time: 10:00 a.m.

PLEASE TAKE NOTICE that on October 29, 1984, at 10:00 a.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Pamela A. Rymer, United States District Court, 312 North Spring Street, Los Angeles, California 90012, plaintiff, GARY BRYANT, will move this court for an order:

(a) Granting relief to the plaintiff from this court's ruling granting summary judgment to the defendant, FORD MOTOR COMPANY, entered on August 27, 1984, pursuant to *Federal Rules of Civil Procedure* 60(b);

In the alternative, plaintiff requests that this court reconsider its ruling with regard to defendant's motion for summary judgment pursuant to *United States District Court Local Rule* 7.16.

The purpose of plaintiff's request to reopen the judgment or, in the alternative, reconsider its ruling is to allow the plaintiff to present to this court the following motions previously filed on August 29, 1984:

1. To join additional defendant parties pursuant to Rule 20 of the *Federal Rules of Civil Procedure*;
2. For leave to file first amended complaint; and thereafter
3. Remand this entire matter to the Superior Court.

This motion is based on the grounds that summary judgment was granted as to FORD MOTOR COMPANY *only* and should not close this matter in its entirety. To do so would prevent the plaintiff from naming other known parties who are in part liable for plaintiff's serious and permanent bodily injuries. Not to reopen the judgment in this matter or at least reconsider its own ruling, the court would in effect be preventing the plaintiff from seeking redress for the permanent injuries received as a result of this accident, which were clearly no fault of his own. Such non-action would further cause plaintiff undue hardship as plaintiff must proceed now to determine the liable parties from which he may seek redress. To await the outcome of an appeal would severely prejudice the plaintiff in his claim for damages. Plaintiff wishes only to reopen the judgment to allow for the consideration of the motions mentioned above. Such action will in no way effect the court's order granting summary judgment or suspend its operation.

This motion is further based on this notice of motion, the pleadings and documents on file herein, the memoran-

dum of points and authorities attached hereto, the declarations of John Sutherland and Timothy J. Wheeler, and any oral argument which may be presented at the time of the hearing of this motion.

DATED: October 1, 1984

GREENE, O'REILLY, AGNEW
& BROILLET

By /s/ Timothy J. Wheeler
Timothy J. Wheeler
Attorneys for Plaintiff,
GARY BRYANT

MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

This action arises out of a single vehicle accident which occurred on or about March 1, 1983. As a result of this accident, plaintiff sustained severe and permanent bodily injury, including but not limited to paralysis of the right leg and major back injuries requiring five radical surgeries. On or about July 9, 1984, the only defendant in this matter at that time, FORD MOTOR COMPANY, filed its motion for summary judgment. Said motion was heard on August 20, 1984, and granted in favor of FORD MOTOR COMPANY.

On or about August 27, 1984, this court entered judgment in favor of FORD MOTOR COMPANY, dismissing FORD from this lawsuit. It was understood by counsel for the plaintiff at the hearing of this motion on August 20, 1984, that summary judgment was granted as to FORD MOTOR COMPANY *only* and that plaintiff would be allowed to name additional defendants in this matter based

on information determined through ongoing discovery and investigation. (See declaration of John Sutherland attached hereto as Exhibit "A".) Based on the belief that summary judgment was granted as to FORD MOTOR COMPANY *only* and that plaintiff would be allowed to name additional defendants as their degree of liability was verified by investigation and discovery, plaintiff filed motions for (a) Joinder, (b) Leave to file first amended complaint, and (c) Remand. Said motions were set to be heard on September 24, 1984, at 10:00 a.m. in this court.

On or about September 24, 1984, attorney John Sutherland of this office attended the scheduled hearing of the above-mentioned motions. At that time, Mr. Sutherland was informed that by reason of the granting of the summary judgment as to FORD MOTOR COMPANY and in lieu of the fact that FORD MOTOR COMPANY was the only named defendant at that time, that the entire case had been closed and taken off the court's active list. This was contrary to the belief of the plaintiff and Mr. Sutherland that plaintiff would be allowed to name additional defendants as discovery and investigation permitted as per the prior Summary Judgment hearing.

II

DISCOVERY OF ADDITIONAL DEFENDANTS

As mentioned in plaintiff's opposition to defendant's motion for summary judgment, as well as in plaintiff's motions re: Joinder, Leave to amend, and Remand, discovery and investigation have placed liability, in part, on the following entities:

(a) City Ford Company, located in Los Angeles, California;

(b) Gruman-Olson Company, located in Los Angeles, California; and

(c) General Seating and Sash Company, located in Tompton, Pennsylvania.

(d) The name of the person or persons or entities responsible for the design, manufacture, assembly or installation of the defective seat restraint system has yet to be determined and cannot be determined until plaintiff is allowed to conduct further discovery as against the above-named potential defendants.

On or about July 10, 1984, plaintiff's attorneys received correspondence from plaintiff's employer's attorney verifying that the subject vehicle was purchased from City Ford Company in Los Angeles on or about May 31, 1968. [A copy of said correspondence is attached hereto as Exhibit "B".] This information was received after defendant filed its motion for summary judgment [July 9, 1984], which clearly shows that plaintiff was still in the process of discovering the involvement of additional defendants at the time he was preparing his opposition to defendant's motion for summary judgment. Also, the involvement of Grumman-Olson Company was not discovered until after the defendant filed its motion for summary judgment based upon the information and belief of consultant experts utilized by the plaintiff in this action.

It was not until just recently on September 12, 1984, that plaintiff received documentation from potential defendant, City Ford Company, with regard to documentation, writings, reports, etc., concerning the subject vehicle. [A copy of the subpoena duces tecum re deposition is attached hereto as Exhibit "C".] As a result of said sub-

poena, plaintiff was notified that no records exist with regard to the subject vehicle. Lack of documentary evidence emphatically requires that the plaintiff take depositions and conduct other formal discovery to determine the location of these records with regard to the subject vehicle. As distributor of the subject vehicle, City Ford Company is in an excellent position to provide evidence as to the parties responsible for the design, manufacture, assembly and/or implementation of the defective seat belt restraint system into the subject vehicle. This evidence can only be obtained by means of formal discovery including interrogatories and depositions.

In effect, plaintiff's hands are tied from conducting further discovery as against the above-named entities unless this court reopens its judgment and allows the joinder of additional parties, or in the alternative reconsiders its ruling with regard to defendant's motion for summary judgment and thereafter reconsider plaintiff's motions for Joinder, Leave to amend, and Remand.

III

THE COURT HAS THE POWER TO GRANT RELIEF FROM THE SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT, FORD MOTOR COMPANY, FOR ANY JUSTIFIABLE REASON. *Federal Rules of Civil Procedure* 60(b)(6).

The plaintiff is not requesting relief from the court's order granting summary judgment in favor of the defendant based on mistake, inadvertence, newly discovered evidence or fraud under 60(b)(1-5), but solely on the grounds that:

(a) This court's granting the summary judgment of FORD MOTOR COMPANY *only* should not preclude the plaintiff from naming additional party defendants whose identities were not discovered until after defendant's motion for summary judgment was filed;

(b) The discovery conducted against City Ford Company by way of subpoena duces tecum re deposition has not provided the requested documentation necessary to the issues of liability in this matter. Therefore, depositions and interrogatories must be served upon City Ford Company as a party to this lawsuit to determine the necessary information. Note that City Ford Company has been determined to be the distributor of the subject vehicle, and therefore relevant information is within their knowledge and control and/or possession which will inform the plaintiff as to the other parties necessary to this lawsuit;

(c) To deny the plaintiff relief from the court's order granting summary judgment as to FORD MOTOR COMPANY only would preclude the hearing of plaintiff's motions re: (1) Joinder, (2) Leave to amend accordingly, and (3) Remand. Without a hearing of these motions, plaintiff will be forever precluded from obtaining compensation for his severe and permanent disabling injuries to which he is entitled by law.

(d) Extraordinary circumstances as well as undue hardship and injustice to the plaintiff warrant the court's discretion under *Federal Rules of Civil Procedure* 60(b)(6).

The so-called "residual clause" of F.R.C.P. 60(b)(6) was intended to cover unforeseen contingencies and to be a means for accomplishing justice under exceptional cir-

cumstances, particularly where extreme hardship and/or injustice for the plaintiff would result. *United States v. McDonald*, 86 F.R.D. 204 (N.D. Ill. E.D. 1980)

In the *McDonald* case, the court allowed the McDonalds to amend the foreclosure order to raise the "homestead exemption" claim which they omitted to raise at the time of the foreclosure hearing. The court found that if they did not allow the McDonalds to amend the foreclosure order to include the homestead exemption claim, that the McDonalds would suffer undue hardship and injustice if they lost their home.

In the case at hand, plaintiff will also experience extreme hardship and injustice if the court does not allow the judgment to be reopened so as to allow the plaintiff to bring its motions for (a) Joinder of additional parties; (b) Leave to amend its complaint, and (c) Remand. Plaintiff requests that this court reconsider its judgment so as to allow the plaintiff to name additional defendants in this lawsuit so that the plaintiff may proceed against those parties responsible for his serious injuries. Not to do so will leave the plaintiff permanently disabled for the remainder of his life without recourse to pursue those parties liable for his injuries. A comparison of the damages that the McDonalds would have suffered are far less severe than those that the plaintiff stands to incur if this motion is not granted.

Plaintiff understands that "extraordinary circumstances" are necessary in order to obtain relief under *F.R.C.P.* 60(b)(6). In the case at hand, it is essential that plaintiff continue his investigation and discovery and proceed with lawsuits against the other potential defendants named herein as the following events will surely occur:

- (1) evidence will be lost, (2) testimony will be forgotten,
- (3) additional documentation will be destroyed with time,
- (4) plaintiff's injuries will worsen without proper medical care and treatment.

The above-mentioned circumstances require that the court use its discretion and apply 60(b)(6) in this instance.

IV

ONCE EXTRAORDINARY CIRCUMSTANCES AND EXTREME HARDSHIP ARE FOUND, F.R.C.P. 60(b)(6) IS TO BE LIBERALLY APPLIED TO ACCOMPLISH JUSTICE. 7 *Moore's Federal Practice* 60.27(2) pp. 352, et seq.

Plaintiff believes that by the contents of this motion as well as the declaration of Timothy J. Wheeler attached hereto as Exhibit "D" that plaintiff has clearly shown extraordinary circumstances do exist in this matter and that plaintiff will in fact incur undue hardship and prejudice and injustice if he is not allowed to pursue this lawsuit against other liable defendants.

WHEREFORE, plaintiff respectfully requests that this court exercise its discretion under 60(b)(6) and consider plaintiff's motions to (1) Join additional parties, (2) Amend his complaint, and thereafter (3) Remand this matter to the Superior Court, the proper forum for this action.

DATED: October 1, 1984

GREENE, O'REILLY, AGNEW
& BROILLET

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Attorneys for Plaintiff,
GARY BRYANT

EXHIBIT "A"

DECLARATION OF JOHN SUTHERLAND

I, John Sutherland, declare and say that:

I am an attorney at law duly licensed to practice before all the courts of the State of California, including the United States District Court. I am an attorney at the law offices of Greene, O'Reilly, Agnew & Broillet, attorneys of record for the plaintiff herein. If called to testify regarding the matters set forth herein, I could and would competently do so.

On or about August 20, 1984, I attended the hearing of the summary judgment motion presented to this court by the defendant, FORD MOTOR COMPANY. Defendant's motion was granted and entered on August 27, 1984.

At the hearing of said motion, it was my understanding and belief that summary judgment was granted in its entirety to FORD MOTOR COMPANY only. It was presented to the court, by way of plaintiff's opposing papers as well as my oral testimony, that at least three additional defendants were necessary to this action. This declarant specifically requested if the summary judgment affected only FORD MOTOR COMPANY and received an affirmative response. Based upon this information and belief, plaintiff prepared his moving papers requesting Joinder of these additional parties, Leave to amend his complaint,

and Remand of this action to the Superior Court of the State of California, which is the proper forum for this lawsuit.

As argued at the hearing of the summary judgment motion, plaintiff is confident that the named potential defendants are, in part, liable for injuries sustained by the plaintiff. It was not until after the filing of defendant's motion for summary judgment that plaintiff became aware of the existence of Cty Ford Company, the distributor of the subject vehicle. Discovery by way of subpoena duces tecum re deposition of the custodian of records of City Ford was not scheduled to be received until on or before September 12, 1984, *after* the hearing of FORD's motion for summary judgment.

Based on the belief that this court granted summary judgment to FORD MOTOR COMPANY *only* and not to the potential defendants named in plaintiff's opposing papers, declarant respectfully requests that this court re-open its order granting summary judgment to the defendant, FORD MOTOR COMPANY, and allow the plaintiff to join the other necessary parties in this action, file its amended complaint, and remand this matter to the Superior Court of the State of California so as to avoid undue hardship, injustice and prejudice to the plaintiff.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of October, 1984, at Los Angeles, California.

GREENE, O'REILLY, AGNEW
& BROILLET

/s/ By John Sutherland

JOHN SUTHERLAND
Declarant

EXHIBIT "B"

[July 9, 1984, correspondence, see at pp. 109-110.]

EXHIBIT "C"

[Notice of Taking Deposition, Deposition Subpoena and
Declaration of Timothy J. Wheeler,
filed August 17, 1984, see at pp. 120-124.]

DECLARATION OF TIMOTHY J. WHEELER

I, Timothy J. Wheeler, declare and say that:

I am an attorney at law duly licensed to practice before all the courts of the State of California, including the United States District Court. I am an attorney at the law offices of Greene, O'Reilly, Agnew & Broillet, attorneys of record for the plaintiff herein. I am the attorney principally responsible for the handling of the matter of *Bryant v. Ford Motor Company* and if called to testify regarding the matters set forth herein, I could and would competently do so.

On or about August 20, 1984, this court entertained defendant's, FORD MOTOR COMPANY, motion for summary judgment and entered its order ruling in favor of the defendant on August 27, 1984.

On or about September 24, 1984, this court denied a hearing of plaintiff's motions to (a) Join additional party defendants, (b) Amend plaintiff's complaint, and (c) Re-

mand this matter to the Superior Court. This declarant understands from John Sutherland of this office who attended the hearing of these motions that the papers were not considered due to the fact that the case of *Bryant v. Ford Motor Company* has been dismissed in its entirety pursuant to the court's order granting summary judgment to FORD MOTOR COMPANY on August 27, 1984.

As the plaintiff in this action has sustained severe and permanent disabling bodily injury including paralysis and back injuries requiring five radical surgeries, it would create an undue hardship and prejudice to the plaintiff to deny him his day in court with regard to the parties liable for these injuries. It would cause further hardship and prejudice to the plaintiff to await the result of an appeal of this court's granting of FORD MOTOR COMPANY's Summary Judgment motion, therefore plaintiff requests relief from this court's order for the sole purpose of allowing plaintiff to name additional parties, including but not limited to (1) City Ford Company, located in Los Angeles, California, (b) Grumman-Olson Company, located in Los Angeles, California, (3) General Seat and Sash Company, located in Tompton, Pennsylvania.

(d) The identity of the person or persons or entities responsible for the design, manufacture, implementation and assembly of the defective seat restraint system are unknown to the plaintiff at this time, however, based on information and belief, plaintiff understands that this company is located in Pacoima, California, however a final determination has not been made due to lack of evidence.

From the outset of this lawsuit, plaintiff has conducted a diligent investigation into the causes of this accident

and the parties responsible therefor. At the time of filing of plaintiff's complaint, plaintiff was aware only of FORD MOTOR COMPANY as a potential defendant in this lawsuit. Due to the lack of documentation, inadequate identification markings on the subject vehicle, destruction of records, etc., it was impossible for plaintiff to determine at the time of the filing of this lawsuit what other parties were responsible for plaintiff's injuries. Therefore, plaintiff filed his complaint naming FORD MOTOR COMPANY as the only defendant before the one year statute of limitations ran.

At the time of the filing of defendant's motion for summary judgment, plaintiff did not suddenly come up with the names of additional non-diverse parties in an effort to save his case, as has been alleged. As evidenced by the letter received July 10, 1984, and attached hereto as Exhibit "B", it was not until that time that plaintiff discovered the identity and liability of City Ford Company. Plaintiff is still in the process of attempting to determine the manufacturer, designer, assembler and implementer of the defective seat restraint system into the subject vehicle, but has been unsuccessful to date. However, in the best interests of the plaintiff, it is the obligation of this declarant to continue his investigation until all liable parties are discovered. To dismiss plaintiff's action at this point in time as against other responsible defendants is highly prejudicial to the plaintiff and creates an undue hardship to him. To date, plaintiff has sustained tens of thousands of dollars in medical bills for which he is responsible. This accident was no fault of the plaintiff and those parties liable for his permanent injuries and

expenses should be forced to compensate the plaintiff based on the evidence.

This lawsuit is a mere seven months old. As FORD MOTOR COMPANY has destroyed all documentation with regard to the chassis of the subject vehicle, the plaintiff is forced to go elsewhere for information regarding the design, manufacture and assembly of the subject vehicle and its component parts. Although discovery and investigation had been ongoing for five months, it was not until July that plaintiff first became aware of a non-diverse defendant. Had plaintiff known at the time of the filing of this lawsuit, he would surely have named City Ford Company as the distributor of the subject vehicle.

Based on this notice of motion, the motion itself, the declaration of John Sutherland, this declaration, and the memorandum of points and authorities contained herein, plaintiff respectfully requests that this court reconsider its decision to close this lawsuit entirely, prohibiting the plaintiff from seeking redress for his terrible injuries by reopening its judgment of August 27, 1984. Plaintiff further respectfully requests that this court then consider plaintiff's motions to (a) Join additional party defendants, (b) Amend his complaint, and thereafter (c) Remand this matter to the Superior Court, as the Superior Court truly is the proper forum for this action.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of September, 1984, at Los Angeles, California.

GREENE, O'REILLY, AGNEW
& BROILLET

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Declarant

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. CV 84-2049 PAR

Date 9/28/84

Title Gary Bryant -v- Ford Motor Company

DOCKET ENTRY

PRESENT:

HON. PAMELA ANN RYMER, JUDGE

Linda Orona

Deputy Clerk

No Appearance

Court Reporter

ATTORNEY PRESENT FOR PLAINTIFFS:

Not Present

ATTORNEYS PRESENT FOR DEFENDANTS:

Not Present

PROCEEDINGS:

Judgment was entered for the sole defendant in this case, Ford Motor Co., on August 27, 1984. On August 29, 1984 plaintiff filed a "motion to remand" to the State Court. Because the Court has no jurisdiction over the action except pursuant to FRCP 60(b), no action will be taken by the Court on the instant motion.

cc: counsel of record.

Initials of Deputy Clerk LO

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Caption omitted in printing)

No. 84-6389
DC CV-84-2049 PAR
Central California

ORDER

(Filed November 8, 1984)

On November 2, 1984 a Prebriefing Conference was held before Conference Attorney Joshua R. Steinhauer. Appellant was represented by George Rosenberg. Appellee was represented by Kurt Osenbaugh.

This appeal is stayed for 30 days. Upon expiration of the stay appellant's counsel shall inform the court in writing of the status of the case and shall indicate that he will be filing a motion for limited remand, request a short continuance of the stay or request the scheduling of a further prebriefing conference, as appropriate.

This order is subject to reconsideration by a judge if any objection is filed within 10 days of the entry of the order.

FOR THE COURT:
By , s/ Joshua R. Steinhauer
Joshua R. Steinhauer
Conference Attorney

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

NO. CV 84-2049-PAR (MCx)

ORDER

(Filed November 21, 1984)

On August 27, 1984, judgment was entered for the sole named defendant in this action, Ford Motor Company. Plaintiff now moves the Court to set aside the judgment under Fed.R.Civ.P. 60(b)(6) in order for plaintiff to name additional defendants. Alternatively, plaintiff moves to have the Court reconsider its ruling under Local Rule 7.16. After carefully reviewing the memorandum and affidavits submitted by plaintiff, the Court waives oral argument pursuant to Local Rule 7.11.

In moving for relief from judgment under Fed.R.Civ.P. 60(b)(6), plaintiff does not challenge the entry of summary judgment in favor of Ford Motor Company. Instead, plaintiff seeks to have the judgment set aside only insofar as is necessary for plaintiff to name additional defendants and to have the case remanded to state court on the ground that the new defendants destroy the Court's diversity jurisdiction. Plaintiff's Notice of Motion, p. 2.

Although plaintiff argues that "undue hardship and injustice" would result from denying his motion, plaintiff has failed to indicate how the entry of judgment in favor of Ford has prejudiced plaintiff's ability to sue other parties in state court. Bringing suit against those parties depends upon California's statute of limitations, its tolling provisions, and the diligence of plaintiff's counsel. The

Court's entry of judgment in favor of an unrelated party does not affect these rights. Plaintiff's argument that judgment was entered "only" as to the named defendant fails to appreciate the absence of *doe* pleading as a part of federal practice.

Plaintiff's motion for reconsideration does not satisfy Local Rule 7.16's requirement that the moving party show (a) a material difference in fact or law; (b) the emergence of new facts or a change of law; or (c) a manifest showing of a failure to consider material facts. Plaintiff argues that new evidence has come to light revealing the identity of *doe* defendants who, if joined prior to the defendant's motion for summary judgment, would have destroyed the complete diversity of the parties. From the face of the affidavits submitted by plaintiff, it is clear that such information was available to plaintiff long before the hearing on the motion for summary judgment. On July 10, 1984, plaintiff "discovered the identity and liability of City Ford Company," one of the three California companies that plaintiff now seeks to join as additional defendants. Wheeler Aff., ¶ (d). The motion for summary judgment was not heard until August 20, 1984, and the Court's decision was not filed until August 27, 1984. During that month and a half, plaintiff failed to join City Ford as a defendant or to move for remand to state court. Plaintiff cannot now characterize the identity and liability of in-state defendants as "new" evidence justifying reconsideration under Local Rule 7.16.

Accordingly, plaintiff's motion to reconsider and motion to set aside judgment are DENIED.

DATED: November 20, 1984.

/s/ Pamela Ann Rymer
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
HONORABLE PAMELA ANN RYMER,
JUDGE PRESIDING

(Caption omitted in printing)

NO. CV 84-2049-PAR

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA

DECEMBER 20, 1984

Elaine J. Cohen, CSR 2706
Official Court Reporter
442-A United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 680-1639

APPEARANCES:

FOR THE PLAINTIFF:

Green, O'Reilly, Broillet, Paul,
Simon, McMillan, Wheeler & Rosenberg
By: John Sutherland
Steve Wilson
816 South Figueroa Street
Los Angeles, California 90017-2516
(213) 482-1122

FOR THE DEFENDANT:

McCutchen, Black, Verleger & Shea
By: Richard A. Goette
600 Wilshire Boulevard
Los Angeles, California 90017
(213) 624-2400

LOS ANGELES, CALIFORNIA; THURSDAY, DE-
CEMBER 20, 1984; 4:30 PM

THE CLERK: Civil 84-2049, Gary Bryant versus
Ford Motor.

Counsel, state your appearances, please.

MR. SUTHERLAND: John M. Sutherland appearing for the plaintiff.

MR. WILSON: Steve Wilson for the plaintiff, also, your Honor.

MR. QUIGLEY: Your Honor, I'm Mark Quigley, the law clerk for Timothy Wheeler. I came in his behalf, since he is attending the MacMartin hearing and surely couldn't make it and apologizes to the court.

MR. GOETTE: Richard Goette, McCutchen, Black, Verleger & Shea, appearing on behalf of the Ford Motor Company.

THE COURT: Mr. Sutherland, I guess this is a conference at your request.

MR. SUTHERLAND: Yes, your Honor. The situation—and again, Mr. Wheeler does apologize. He attempted to avoid having to go to the MacMartin matter but, unfortunately, since his children were involved, the therapist indicated that it was necessary that he be present, and I am appearing in his stead.

With reference to the incident matter, it has come to the attention of the plaintiff through the appellate court that because of certain problems with the timing of the order in this case on motion for reconsideration, that it is necessary and desirable that a partial remand be made in this matter so that the court may properly of jurisdiction. If I may explain briefly, your Honor. When the motion was originally heard for reconsideration, the matter had already been taken up by the court of ap-

peals, and according to the cases and according to the court of appeals, technically the court did not have jurisdiction at that time; therefore, they indicated that they would entertain and grant a motion for partial remand so that the matter could be properly heard by this court, and it is our understanding of the position of the rules of this court that it is necessary and proper that we appear before you in form of a status conference in order that this matter may be conveniently scheduled and arranged according to the calendar and procedures of this court.

THE COURT: All right. Do you want a date to hear that?

MR. SUTHERLAND: Yes. Your Honor, basically the position that we are taking—in an effort to remind your Honor of what is involved in this, this is a matter of a paraplegic who—

THE COURT: Yes. I understand that. What has happened is that the court of appeals said that I didn't have jurisdiction because the notice of appeal had already been filed when I rendered my decision on the motion to reconsider.

MR. SUTHERLAND: Precisely.

THE COURT: I now have jurisdiction to do so.

MR. SUTHERLAND: It will grant, it is stated, a motion for partial remand.

THE COURT: It has not done so.

MR. SUTHERLAND: It has not done so. It will do so.

THE COURT: All right. When I receive the word that partial remand has been accomplished, then I will enter the ruling that I made in connection with the motion to reconsider.

MR. SUTHERLAND: We would request, your Honor, the opportunity to place new papers before the court on certain important matters that we think ought to be brought to your Honor's attention which might short circuit matters in the interest of judicial economy.

THE COURT: Well, Mr. Sutherland, I am just, I must say, very hard pressed to understand what your position is. You have every opportunity in the world to plead against whomever you wish in state court. We're not writing you out of any of claim that you have to make against the—whatever the local Ford agency is and anyone else that you think is involved. But Doe pleading is not appropriate in federal court. You are absolutely correct in saying that the Ford Motor Company was the only person against whom my motion ran, because it's the only party that's recognized in this court.

MR. SUTHERLAND: The problem, your Honor, is unless and until—We are in a conundrum at this point, your Honor.

THE COURT: Why?

MR. SUTHERLAND: Because of the fact that apparently the action remains removed to the federal court, there is no pending state action as we presently understand.

THE COURT: But there is nothing to keep you from filing a state action except just typing it and signing it and filing it up the hill.

MR. SUTHERLAND: The problem there, of course, is that when this action was removed, it was timely filed, and there is some question as to whether an action presently filed would be timely.

THE COURT: Well, if you get on it, there is not going to be, but if you sit on it, there may very well be. Customarily when one case is pending in one court and that court decides that it can't hear the case or it makes a disposition of that case, there is a little period of grace when you can file it in some other court. But, you know, that option is up to you. I notice that one of the people that you want to bring in is a Pennsylvania or some other corporation. I have forgotten the name of people now, but it's back East some place. And you've got two local people. I mean regardless—maybe I was in error. Maybe the court of appeals will say that my summary judgment shouldn't be granted, but regardless of that, you ought to protect your rights by filing an action against parties who were not before me in state court.

MR. SUTHERLAND: Well, the problem with that, your Honor, is the timeliness of the state court.

Now, is it my understanding, then, that the court has essentially remanded the balance of the case back to the state court?

THE COURT: Mr. Sutherland, there is no balance of this case to remand. There is no such thing as a Doe in this court. It is not recognized in federal court. There

is nothing left of this case to send back to state court. I dealt with the only case that in front of me, which was a case against the party which had been named and served, and that's the Ford Motor Company. Now, if I am reversed by the court of appeals on summary judgment, I will still only have one case, and the only case that I will have will be a case against the Ford Motor Company.

MR. SUTHERLAND: Well, you see, your Honor, the problem we have is this: As I have indicated, we have a paraplegic client. We also have a circumstances where under Rule 11, we were required to exercise certain care before bringing in a party, lest it be found that we did not, as was the case with the City Ford Agency, have adequate evidence of participation, be accused of misjoinder, and lose the right to deal with that party for all time; therefore, we, in expeditious fashion, as I think the court is aware, propounded proper legal process to them to determine their participation or lack thereof. When we found that they had destroyed all their records, realizing that we had no other option, we then were in position under Rule 11 to proceed. Until we did that, we could have been accused of misjoinder and we would have essentially lost the right to that party for all time.

The effect of what the court has done is to leave us in a twilight zone, a vacuum. We neither have, apparently, a position here and we are uncertain of our standing in state court as well.

THE COURT: Well, I just don't know what else I can say. My advice, and it's worth exactly what free legal advice generally is worth, particularly from someone who

is no longer admitted to practice in the bar of this state, is that you file in the state court.

MR. SUTHERLAND: Your Honor, may we impose on the court to this extent? May we place before the court upon the partial remand additional legal papers to explain our position clearly, concisely, and completely?

THE COURT: Mr. Goette?

MR. GOETTE: Yes. I would just like to advise the court that I'm here only as an accommodation to opposing counsel only because the court has been kind enough to set some time aside. We don't think this court has jurisdiction. The chronology is helpful here. Let me just run through it to refresh your Honor's recollection.

The motion for summary judgment was granted August 20. On August 27, final judgment was entered as to the only defendant in that case. As of that time, there was no opportunity to remand this case back down to state court. Remand was proper at any time up until the judgment was entered. There followed a series of motions. There was a motion apparently for leave to remand the case two days after the judgment was entered. I received no notice of that motion. I only heard about that motion through the courtesy of the court's ruling. Another motion was filed thereafter. And the court, by the way, properly ruled on it, in our opinion, that there was no subject matter jurisdiction to hear a motion for reconsideration. Plaintiff then filed on October 4, after their notice of appeal had been filed, a motion for relief under Rule 60(b), and this court denied that motion.

Now plaintiffs are trying to substitute their rights under Rule 60 for their appellate rights. Either they want

to take this case up on appeal or they don't. But there is no twilight zone. They simply have to make a decision as to what they want to do.

THE COURT: I just don't know what I can do in that regard. I mean I've done what I can do. If the case comes back to me for some limited purpose of entering my ruling at the right time, I can do that.

MR. GOETTE: As I understand it, your Honor, the rule in this circuit is that under Rule 60, a party can petition the court and ask whether they are going to entertain or grant the motion for—to set aside the judgment under Rule 60(b).

Now, in situations where a notice of appeal has been filed and a motion to set aside the judgment under Rule 60(b) is then filed and is argued and the court rules on it, there are cases in this circuit whereby the Ninth Circuit will treat that as a request to remand, depending—you know, if the court has denied the motion, they can seek a remand on that, and the appellate court can consider it. There is no reason to keep coming back before the district court and trouble your Honor with this case. This case has been briefed and argued, and the only issue here is, number one, on the summary judgment whether that was proper or not and then, number two, whether plaintiff had some rights under Rule 60(b), and that has been decided.

THE COURT: I just can't—you know, Mr. Sutherland, if I get something back from the Ninth Circuit that tells me to do something, I will say "Yes, sir" and do it, but until that happens, it is my view that I was through with the case.

MR. WILSON: May I speak to that, your Honor?
Steve Wilson.

THE COURT: Yes.

MR. WILSON: With regard, also, to what Mr. Goette was saying, the court of appeals referred us to the case of Smith versus Lujan, 588 F.2d 1304. In that case, and that is why we are here, the court instructed that the proper relief for a plaintiff under the precise circumstances we have here is to ask the district court if it will—if it wished to entertain the motion that—which was made in the absence of jurisdiction. We are here, then, to see if it is possible to reemphasize the need for our motion that the court ruled on on November 21st. I believe there are two points—

THE COURT: What you are asking me is if I will reentertain the motion?

MR. WILSON: Yes, your Honor. And at that point, then, we are to go back to the court of appeals and move for that partial remand that Mr. Sutherland referred to.

THE COURT: Well, I don't see any reason for me to reentertain it.

MR. WILSON: Your Honor, I believe there are two things that were perhaps not emphasized with enough clarity. The first is the court—the word identity that the court seized on, and that has—it was an unfortunate word. We had no—if the court would look in all of our other papers, the—we never, ever said we knew of the potential liability—we said we knew of the potential liability, not the liability of City Ford. At that point, had the

court not focused so decisively on the word "liability," I believe we might have had a better standing to ask for joinder and possible remand.

THE COURT: Well, I don't even know what I'm supposed to do right now, frankly. I mean an oral request to do something that—I don't even know what has been said to you by the Ninth Circuit. If you want me to do something, put it in writing and I will respond to it.

MR. GOETTE: Could I request, your Honor, that any papers that are served this time by plaintiff's counsel be served upon me?

MR. SUTHERLAND: I will be done. I apologize if it was improperly not done.

The final point, your Honor, is simply that we believe we have followed the court rules, especially the court's Rule 11 with regard to the dangers of service of process where bringing parties into a lawsuit without proper investigation is, to say the least, frowned upon in this court. And we feel that our position was that we are in a conundrum. On the one hand, we did the investigation, and yet on the other hand, our client may suffer because we did the investigation.

THE COURT: All right. Well, if you want me to do something, just put the request in writing so that I clearly understand what it is that I am being asked to do and then I can make a response to you in writing.

MR. SUTHERLAND: That will be done immediately, your Honor.

THE COURT: All right.

MR. SUTHERLAND: I thank you, your Honor.

MR. GOETTE: Thank you, your Honor.

Mr. Wilson: Thank you, your Honor.

I, Elaine J. Cohen, CSR 2706, do hereby certify that the foregoing is a true and correct transcription of my stenographic notes.

Dated this 18th day of January 1985

Elaine J. Cohen, CSR 2706

GREENE, O'REILLY, BROILLET, PAUL, SIMON,
McMILLAN, WHEELER & ROSENBERG

Lawyers

Los Angeles Office

816 South Figueroa Street

Los Angeles, California 90017-2516

(213) 482-1122

(213) 482-1350

Attorneys for Plaintiff-Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Caption omitted in printing)

No. 84-6389

DC# CV-84-2049 PAR

Central California

NOTICE OF MOTION AND
MOTION FOR LIMITED REMAND

(Filed January 11, 1985)

TO ALL PARTIES HEREIN AND TO THEIR
ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that pursuant to this court's order filed November 8, 1984, and attached hereto as Exhibit "A", plaintiff-appellant will move this court for an order for limited remand granting partial jurisdiction to the United States District Court, Central District, in the matter of *Gary Bryant v. Ford Motor Company*, case no. C 84 2049-PAR. Granting partial jurisdiction to the District Court, and particularly to the Honorable Pamela A. Rymer, will allow the court to consider plaintiff's notice of motion and motion for relief from judgment, and thereafter properly enter its order with regard to that motion. Plaintiff's original motion for relief from judgment was filed October 4, 1984, and the court's order filed thereafter on November 21, 1984. Copies

of both plaintiff's motion and the court's order are attached hereto as Exhibits "B" and "D".

In conjunction with this motion for limited remand, plaintiff has filed his motion to vacate the court's order filed November 21, 1984, in response to plaintiff's motion for relief from judgment of order, as said order was improperly entered as the District Court lacked jurisdiction in which to do so.

This motion is based on this notice of motion, the pleadings and documents on file herein, the memorandum of points and authorities attached hereto, the declaration of Timothy J. Wheeler and John Sutherland, and any oral argument which may be allowed at the hearing of this motion.

DATED: January 9, 1985

GREENE, O'REILLY,
BROILLET, PAUL, SIMON,
McMILLAN, WHEELER
& ROSENBERG

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Attorneys for Plaintiff-
Appellant, GARY BRYANT

MEMORANDUM OF POINTS AND AUTHORITIES

I

STATEMENT OF THE CASE

This action arises out of a single vehicle accident which occurred on or about March 1, 1983. As a result of this accident, plaintiff sustained severe and permanent bodily injury, including but not limited to paralysis of the right

leg and major back injuries requiring five radical surgeries. Thereafter, on January 27, 1984, plaintiff filed his complaint for damages against the only known defendant at that time, FORD MOTOR COMPANY and DOES 1 through 100. On or about July 9, 1984, defendant, FORD MOTOR COMPANY, filed its motion for summary judgment. Said motion was heard on August 20, 1984, and granted in favor of FORD MOTOR COMPANY.

On or about August 27, 1984, the Honorable Pamela A. Rymer of the District Court of California, Central District, entered judgment in favor of FORD MOTOR COMPANY, dismissing FORD MOTOR COMPANY from that lawsuit. It was understood by counsel for the plaintiff at the hearing of this motion on August 20, 1984, that summary judgment was granted as to FORD MOTOR COMPANY only, and that plaintiff would be allowed to name additional defendants in that matter based on information determined through ongoing discovery and investigation. (See Declaration of John Sutherland attached hereto as Exhibit "C".) Based on the belief that summary judgment was granted as to FORD MOTOR COMPANY only and that plaintiff would be allowed to name additional defendants as their degree of liability was verified by investigation and discovery, plaintiff filed his Motion For (Joinder), (b) Leave To File First Amended Complaint, and (c) Remand. Said motions were set to be heard on September 24, 1984, at 10:00 a.m., before the Honorable Pamela A. Rymer.

On or about September 24, 1984, attorney John Sutherland of this office attended the scheduled hearing of the

above-mentioned motions. At that time, Mr. Sutherland was informed that the district court would not consider plaintiff's motions because of the granting of the summary judgment as to FORD MOTOR COMPANY and in light of the fact that FORD MOTOR COMPANY was the only named defendant at that time, the entire case had been closed and taken off the court's active list.

On or about October 4, 1984, plaintiff filed his Notice of Motion and Motion for Relief From Judgment or Order Pursuant to *F.R.C.P.* Rule 60(b)(6), or in the alternative, a Motion for Reconsideration Pursuant to *Local Rule* 7.16. A copy of this motion is attached hereto as Exhibit "B". Said motion was to be heard on October 29, 1984, however the court did not enter its ruling until on or about November 21, 1984.

Prior to the district court's determination with regard to plaintiff's motion for reconsideration, plaintiff determined that the district court was without jurisdiction to consider plaintiff's moving papers and to subsequently make a judgment thereon as plaintiff had filed his Notice of Appeal from the summary judgment Order on or about September 26, 1984. (See *Smith v. Lujan*, 588 F.2d 1304 (1979); *Crat o, Inc. v. Intermark, Inc.*, 536 F.2d 862 (1976).)

As a result of finding that the district court was without jurisdiction, plaintiff scheduled a status conference set to be conducted on December 20, 1984, at 4:30 p.m. before the Honorable Pamela A. Rymer. All parties were notified as well as Joshua R. Steinhauser, of the U.S. Court of Appeals, Ninth Circuit, by way of correspondence dated December 3, 1984. (A copy of this letter is attached hereto

as Exhibit "E".) By way of this letter, plaintiff requested an additional thirty day stay of the appeal of the district court's order granting summary judgment in favor of FORD MOTOR COMPANY. The stay was requested with the hope that other issues regarding other potential defendants could be resolved thereby avoiding the appeal. Said stay was requested up to and including a date on or about January 7, 1985.

At the December 20, 1984, status conference, Judge Rymer indicated that she would be willing to again review plaintiff's motion for Reopening of Judgment or Order and Motion for Reconsideration if the Court of Appeals restored partial jurisdiction allowing the district court to do so. As such, plaintiff has filed this Notice of Motion and Motion For Limited Remand in an effort to restore partial jurisdiction to the district court so that the Honorable Pamela A. Rymer may again review plaintiff's motion for reconsideration as well as supplemental papers which plaintiff intends to file pursuant to *Federal Rule of Civil Procedure* § 15. (A copy of plaintiff's supplemental papers is attached hereto as Exhibit "F".)

II

THE DISTRICT COURT HAD NO JURISDICTION TO MAKE AN ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT AFTER NOTICE OF APPEAL HAD BEEN FILED IN ABSENCE OF A REMAND FROM THE COURT OF APPEALS.

On or about August 27, 1984, the Honorable Pamela A. Rymer entered summary judgment in favor of FORD MOTOR COMPANY in the case of *Gary Bryant v. Ford Motor Company*, case no. CV 84-2049-PAR. On or about

September 26, 1984, plaintiff timely filed his Notice of Appeal of the district court's order granting summary judgment, thereby placing jurisdiction over this matter with the United States Court of Appeals, Ninth Circuit. At a December 20, 1984, status conference, the Honorable Pamela A. Rymer indicated that she would be willing to reconsider plaintiff's Motion For Relief From Judgment or Order, Or, In the Alternative, Plaintiff's Motion For Reconsideration Pursuant to *Local Rule* 7.16. (See Declaration of John Sutherland.) The proper procedure as set forth in the case of *Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862 (9th Circuit 1976) is for the plaintiff to move this court for an order granting limited remand of the case which would in effect give partial jurisdiction to the U.S. District Court to reconsider plaintiff's Motion to Reopen Judgment or Order, as well as the plaintiff's supplemental papers to be filed in support of that motion. *Smith v. Lujan*, 588 F.2d 1304 (9th Circuit 1979).

Granting of this motion will allow the district court to obtain proper jurisdiction in which to thereafter properly review plaintiff's motions, and thereafter enter its order in response thereto. The purpose of plaintiff's Motion for Reopening of Judgment or Order is to allow the district court to make a ruling with regard to plaintiff's motions for (a) amendment of his complaint, (b) joinder of additional potential defendants, and (c) remand of this matter to the superior court level based on lack of diversity. It would create undue hardship and prejudice to the plaintiff if he were not allowed to pursue other potential defendants unknown at the time of the summary judgment granted in favor of FORD MOTOR COMPANY as he is precluded from entertaining additional actions at the state

court level due to the expiration of the one year statute of limitations. (See Declaration of Timothy J. Wheeler.

Wherefore, plaintiff respectfully requests that this court grant plaintiff's motion for limited remand, thereby transferring partial jurisdiction back to the district court, allowing the court to properly consider plaintiff's moving papers as well as plaintiff's supplemental papers so that plaintiff may thereafter amend his complaint to join additional defendants and pursue this matter at the state court level.

DATED: January 9, 1984

Respectfully submitted,

GREENE, O'REILLY, BROILLET, PAUL,
SIMON, McMILLAN, WHEELER & ROSENBERG

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Attorneys for Plaintiff-
Appellant, GARY BRYANT

DECLARATION OF TIMOTHY J. WHEELER

I, Timothy J. Wheeler, declare and say that:

I am an attorney at law duly licensed to practice before all the courts of the State of California, including the United States District Court. I am an attorney at the law offices of Greene, O'Reilly, Broillet, Paul, Simon, McMillan, Wheeler & Rosenberg, attorneys of record for the plaintiff herein. I am the attorney principally responsible for the handling of the matter of *Bryant v. Ford Motor Company*, and if called upon to testify regarding matters set forth herein, I could and would competently do so.

I have read the "Statement of The Case" included herein as Part I of the Memorandum of Points and Authorities, and attest to its accuracy in lieu of reiterating the sequence of events which have transpired in this action.

The plaintiff in this action has been severely injured through no fault of his own. As a result of the summary judgment motion granted in favor of FORD MOTOR COMPANY and entered on August 27, 1984, it appears that plaintiff may be forever barred from pursuing other potential tortfeasors for compensation for his grave and serious injuries. As stated, this accident occurred on March 1, 1983. On January 27, 1984, well within the mandatory one year statute of limitations period, plaintiff filed his summons and complaint in Los Angeles County Superior Court, Central District. In that action, plaintiff named FORD MOTOR COMPANY, the only known defendant at that time, and Does 1 through 100.

On March 29, 1984, and after the March 1, 1984, one year statute of limitations period had expired, defendant, FORD MOTOR COMPANY, filed its petition for removal of this matter to the district court based on diversity jurisdiction. Afterwards, by way of answers to interrogatories and FORD MOTOR COMPANY's motion for summary judgment, particularly the affidavit of James I. Scott, design analysis engineer for FORD MOTOR COMPANY, plaintiff determined that FORD MOTOR COMPANY was not solely liable for his injuries, and as such plaintiff conducted additional discovery and investigation to determine those other possible tortfeasors. However, due to registration and identification problems with the subject vehicle, destruction of records and lack of proper documentation, plaintiff was unable to determine the identity of

all other possible tortfeasors until a time after the district court granted summary judgment in favor of FORD MOTOR COMPANY. Plaintiff became aware that other possible tortfeasors existed, however, due to lack of information and documentation, plaintiff could not accurately determine the extent or nature of the liability of these possible tortfeasors. For plaintiff to have joined other possible tortfeasors, particularly other California defendants, based solely on a reference to their potential involvement in this matter, would have clearly been considered misjoinder under *F.R.C.P.* § 11, § 19 and § 20 as an effort to defeat diversity. In addition, for plaintiff to have attempted to join City Ford Company as a defendant on or about July 10, 1984, would have been in clear violation of Rule 11, as plaintiff's counsel did not have sufficient knowledge, information or belief that there was good ground to support plaintiff's joinder of City Ford Company as a defendant until further discovery and investigation were conducted.

Due to the fact that summary judgment was granted in favor of the sole defendant known to the plaintiff at the time of filing of this action, and due to the fact that the one year statute of limitations period has run in the Superior Court, [although plaintiff diligently filed his causes of action against unknown Doe defendants prior to the one year statute of limitations period] the court has apparently barred the plaintiff from pursuing claims against possible tortfeasors he now believes to be liable, namely: City Ford Company, Grumman-Olson Company, General Seat and Sash Company, and possibly others still unknown to plaintiff at this time.

As plaintiff was diligent in filing his complaint for damages against FORD MOTOR COMPANY and other unknown defendants before the one year statute of limitations period expired, plaintiff should not be precluded from pursuing claims against possible tortfeasors he has identified through discovery and investigation after the one year statute of limitations period expired, or because summary judgment was granted to FORD MOTOR COMPANY only; the only known defendant at that time.

Therefore, plaintiff respectfully requests that this court grant this motion for limited remand allowing the district court to reconsider plaintiff's motions previously filed, allowing the plaintiff to pursue claims against other possible tortfeasors so that he may be compensated for his severe and permanent disabling injuries.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of January, 1985, at Los Angeles, California.

GREENE, O'REILLY, BROILLET, PAUL,
SIMON, McMILLAN, WHEELER & ROSENBERG
By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Declarant

DECLARATION OF JOHN SUTHERLAND

I, John Sutherland, declare and say that:

I am an attorney at law duly licensed to practice before all the courts of the State of California, including the United States District Court. I am an attorney at the law offices of Greene, O'Reilly, Broillet, Paul, Simon, McMil-

lan, Wheeler & Rosenberg, attorneys of record for the plaintiff herein. I am the attorney who appeared at the status conference scheduled on December 20, 1984, before the Honorable Pamela A. Rymer, United States District Judge, Central District. In my company were attorney Steven Wilson, of this office, and Mark Quigley, law clerk, also of this office.

At the December 20, 1984, status conference indicated above, I indicated to the court that plaintiff had determined that the court was without jurisdiction to enter its order filed November 21, 1984, and attached hereto as Exhibit "C". The Honorable Pamela A. Rymer indicated that she would be willing to reconsider plaintiff's moving papers if in fact the Court of Appeals, Ninth Circuit, granted her the proper jurisdiction in which to do so. As such, plaintiff has filed this motion requesting the Court of Appeals to do so.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of January, 1985, at Los Angeles, California.

GREENE, O'REILLY, BROILLET,
PAUL, SIMON, McMILLAN,
WHEELER & ROSENBERG

By /s/ John Sutherland
JOHN SUTHERLAND
Declarant

EXHIBIT "A"

[U.S. District Court Order filed November 8, 1984,
see at p. 172.]

EXHIBIT "B"

[Notice of Motion and Motion for Relief from
Judgment of Order, filed October 4, 1984,
see at pp. 156-158.]

EXHIBIT "C"

[Declaration of John Sutherland, see at pp. 165-167;
July 9, 1984 letter, see at pp. 109-110; Notice of
Deposition, Deposition Subpoena and Declaration of
Timothy Wheeler, see at pp. 120-124; September
28, 1984 Order, see at p. 155.]

EXHIBIT "D"

[U.S. District Court Order filed November 21, 1984,
see at pp. 173-175.]

EXHIBIT "E"

GREENE, O'REILLY, BROILLET, PAUL, SIMON,
McMILLAN, WHEELER & ROSENBERG

Lawyers

Los Angeles Office

816 South Figueroa Street

Los Angeles, California 90017-2516

(213) 482-1122

(213) 482-1350

Bruce A. Broillet

Browne Greene

William N. McMillan

Charles B. O'Reilly

Gary M. Paul

George M. Rosenberg

Aaron H. Simon

Timothy John Wheeler

Washington, D.C. Office

1000 Connecticut Avenue,
N.W.

Suite 1205

Washington, D.C. 20036

(202) 293-0172

Counsel-Michael L. Goldberg

Denver R. Andrews, Jr.
Janice M. Corsino
Craig J. De Recat
Donna R. Evans
Stephen L. Jacques
David Timothy Kupfer
R. Kevin McAuliffe
Leta St. Clair Schlosser
Antony Stuart
John M. Sutherland

Of Counsel
Harry N. Philo

Administrator
Francis K. Cholko

December 3, 1984

Joshua R. Steinhauer, Esq.
Conference Attorney
U.S. Court of Appeals
Ninth Circuit
P.O. Box 547
San Francisco, CA 94101

Re: *Gary Bryant v. Ford Motor Company*

Dear Mr. Steinhauer:

On November 8, 1984, an order was filed in this matter staying the appeal for thirty days. As we discussed in our telephone conversation last week, plaintiff requests an additional thirty (30) day extension of time up to and including January 7, 1985, before commencing with the appeal. The primary purpose of this request is to allow plaintiff's counsel as well as counsel for Ford Motor Company to participate in a status conference before the Honorable Pamela A. Rymer. The status conference has been agreed to by the court, Richard Goette, counsel for Ford Motor Company, and plaintiff's counsel, and will take place on December 20, 1984, at 4:30 p.m. At that time, counsel hopes to resolve issues, making it unnecessary to go further with our appeal.

If a stay will not be possible or if you have any questions whatsoever, please feel free to contact Timothy Wheeler, of this office, at your convenience.

Thank you for your continuing cooperation.

Very truly yours,
GREENE, O'REILLY, BROILLET,
PAUL, SIMON, McMILLAN,
WHEELER & ROSENBERG

/s/ Mark Quigley
Mark Quigley, law clerk to
Timothy J. Wheeler

MQ:jw

EXHIBIT "G"

CITY FORD

1800 Pasadena Ave. • Los Angeles, California 90031
Telephone: (213) 221-5151

RECEIVED
August 30, 1984

GREENE, O'REILLY, AGNEW & BROILLET

August 29, 1984

Tim Wheeler
Attourney at Law
Los Angeles, California 90017
Subject: Gary Bryant

We are unable to provide any records on the sale of the P500 Van as requested in your subpoena dated August 17, 1984. Our records are not retained for more than three years.

Yours Very Truly,
/s/ Paul Cunningham
Paul Cunningham
Business Manager

(Proof of service omitted in printing)

GREENE, O'REILLY, BROILLET, PAUL, SIMON,
McMILLAN, WHEELER & ROSENBERG

Lawyers

Los Angeles Office

816 South Figueroa Street

Los Angeles, California 90017-2516

(213) 482-1122

(213) 482-1350

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

CASE NO. C 84 2049 PAR (mex)

SUPPLEMENTAL DECLARATION OF
TIMOTHY J. WHEELER

PLEASE TAKE NOTICE that on a date yet to be determined, in the courtroom of the Honorable Pamela A. Rymer, U.S. District Judge, 312 North Spring Street, Los Angeles, California 90012, plaintiff, GARY BRYANT, will again request that this court reconsider its Motion for Relief from Judgment or Order (*F.R.C.P.* § 60(b)) or in the Alternative, a Motion for Reconsideration: *Local Rule 7.16*, originally filed on October 4, 1984, which Order was entered on November 21, 1984.

Plaintiff requests that once jurisdiction is granted to the district court by the U.S. Court of Appeals, Ninth Circuit, pursuant to plaintiff's Motion for Limited Remand, that the court entertain plaintiff's Motion for Relief from Judgment or Order, as well as this Supplemental Declaration of Timothy J. Wheeler, as a part of that motion.

DATED: January 11, 1985

GREENE, O'REILLY, BROIL-
LET, PAUL, SIMON, McMIL-
LAN, WHEELER & ROSEN-
BERG

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Attorneys for Plaintiff,
GARY BRYANT

MEMORANDUM OF POINTS AND AUTHORITIES

I

"THE SIGNATURE OF AN ATTORNEY CONSTITUTES A CERTIFICATE BY HIM THAT HE HAS READ THE PLEADING; THAT TO THE BEST OF HIS KNOWLEDGE, INFORMATION AND BELIEF THERE IS GOOD GROUND TO SUPPORT IT; AND THAT IT IS NOT INTERPOSED FOR DELAY. IF A PLEADING IS NOT SIGNED OR IS STRICKEN WITH THE INTENT TO DEFEAT THE PURPOSE OF THIS RULE, IT MAY BE STRICKEN AS A SHAM AND FALSE. . ." *Federal Rule of Civil Procedure 11*

As stated in the Declaration of Timothy J. Wheeler attached hereto, on or about July 10, 1984, and for the time period thereafter up to and including August 30, 1984, the plaintiff was without good ground to support a motion to amend his complaint or a motion for joinder of other possible tortfeasors, particularly City Ford Company, and therefore plaintiff cannot be accused of a lack of diligence by not filing said motions on or before the August 20, 1984, hearing of the summary judgment brought by FORD MOTOR COMPANY. Had plaintiff attempted at a time on or about July 10, 1984, when he

first learned of the existence of City Ford Company, to make a motion to amend his complaint and join City Ford Company as a defendant in this action, without sufficient knowledge, information or belief to support said motions, the plaintiff would surely have been in violation of Rule 11, and said actions would have been construed as misjoinder in violation of Rules 19 and 20. This procedure of naming a potential defendant, particularly a resident defendant, without adequate grounds, has been consistently frowned upon by the court as a method of defeating diversity jurisdiction. As such, plaintiff chose to conduct further discovery and investigation before naming City Ford Company as a defendant in this action, and did so by serving a subpoena duces tecum re deposition on the Custodian of Records of City Ford Company in an attempt to determine the nature and extent of their potential liability and affording that entity the opportunity to refute any allegations of possible liability before doing so. It was not until August 30, 1984, after the hearing of the summary judgment motion and after the entry of judgment with regard to that summary judgment motion, did plaintiff discover that City Ford Company was without any documentation whatsoever with regard to the subject vehicle (see Exhibit "G"). As such, plaintiff has given City Ford Company adequate opportunity to defeat allegations that they are liable in part for plaintiff's serious injuries, and City Ford Company has been unable to provide the plaintiff with sufficient documentation or other information which would lead the plaintiff to believe that City Ford Company is not liable in part for plaintiff's injuries. As such, plaintiff should be allowed to pursue the potential liability of City Ford Company by naming them as a defendant in this lawsuit at this time.

DATED: January 11, 1985

Respectfully submitted,
GREENE, O'REILLY, BROILLET,
PAUL, SIMON, McMILLAN,
WHEELER & ROSENBERG

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Attorneys for Plaintiff,
GARY BRYANT

DECLARATION OF TIMOTHY J. WHEELER

I, Timothy J. Wheeler, declare and say that:

I am an attorney at law duly licensed to practice before all the courts of the State of California, including the United States District Court. I am an attorney at the law offices of Greene, O'Reilly, Broillet, Paul, Simon, McMillan, Wheeler & Rosenberg, attorneys of record for the plaintiff herein. I am the attorney principally responsible for the handling of the matter of *Bryant v. Ford Motor Company*, and if called upon to testify regarding matters set forth herein, I could and would competently do so.

On or about November 21, 1984, this court entered its Order in response to plaintiff's Motion for Relief from Judgment or Order, or in the Alternative, a Motion for Reconsideration, filed October 4, 1984. However, as indicated in plaintiff's moving papers to the U.S. Court of Appeals, Ninth Circuit, requesting restoration of partial jurisdiction to the district court, this declarant hereby asks that this court reconsider plaintiff's Motion for Relief from Judgment and Motion for Reconsideration once proper jurisdiction has been restored at the district level.

The plaintiff in this action has been severely injured through no apparent fault of his own. As a result of the

summary judgment motion granted in favor of FORD MOTOR COMPANY and entered on August 27, 1984, it appears that plaintiff may be forever barred from pursuing other possible tortfeasors for compensation for his grave and serious injuries.

As stated, this accident occurred on March 1, 1983. On January 27, 1984, well within the mandatory one year statute of limitations period, plaintiff filed his summons and complaint in Los Angeles County Superior Court, Central District. In that action, plaintiff named FORD MOTOR COMPANY, the only known defendant at that time, and DOES 1 through 100.

On March 29, 1984, and after the March 1, 1984, one year statute of limitations period had expired, defendant, FORD MOTOR COMPANY, filed its petition for removal of this matter to the district court based on diversity jurisdiction. Thereafter, on April 4, 1984, defendant FORD MOTOR COMPANY answered plaintiff's complaint.

By way of answers to interrogatories, a vehicle inspection, and FORD MOTOR COMPANY's motion for summary judgment, particularly the affidavit of James I. Scott, design analysis engineer for FORD MOTOR COMPANY, plaintiff determined that FORD MOTOR COMPANY was not solely liable for his injuries, and as such plaintiff conducted further discovery and investigation to determine the identity of other possible tortfeasors. However, due to improper identification of the subject vehicle, lack of proper documentation, and destruction of records by not only FORD MOTOR COMPANY but also City Ford Company, plaintiff was unable to de-

termine the identity of other possible tortfeasors until a time after the district court granted summary judgment in favor of FORD MOTOR COMPANY. A review of plaintiff's opposition to FORD's Summary Judgment Motion clearly indicates that it was plaintiff's contention that granting summary judgment was premature until adequate documentation could be compiled in order to make a determination as to the liability of FORD and other possible tortfeasors.

Although plaintiff became aware that other possible tortfeasors obviously existed, he could not accurately determine the extent or nature of the liability of these possible tortfeasors due to the lack of information and documentation. For plaintiff to have joined other possible tortfeasors, particularly other California defendants, based solely on an inference as to their potential involvement in this matter would clearly have been considered misjoinder under *F.R.C.P.* § 11, § 19 and § 20 as an effort to defeat diversity.

As discussed in plaintiff's Memorandum of Points and Authorities, *Federal Rule of Civil Procedure* § 11 dictates that an attorney not sign any pleading unless, to the best of his knowledge, information and belief, there is good ground to support it. Furthermore, if a pleading is signed with the intent to defeat the purpose of this rule, the pleading may be stricken as sham. For these reasons, plaintiff, in good faith, declined to join City Ford Company as a defendant in this action based solely on the July 9, 1984, letter sent to plaintiff's counsel by attorneys for United Parcel Service.

The July 9 letter indicated that United Parcel Service's remaining records listed City Ford Company in Los Angeles as the distributor of the subject vehicle and further advised that other information in that regard may be found in City Ford's records.

In my earlier declaration dated September 27, 1984, and incorporated as part of plaintiff's Motion for Relief from Judgment or Order filed October 4, 1984, it was erroneously indicated that the plaintiff discovered the identity and "liability" of City Ford Company on or about July 10, 1984, by way of correspondence sent to the plaintiff by the attorneys for United Parcel Service. The July 9, 1984, letter sent by attorneys for United Parcel Service merely mentioned that City Ford Company was the distributor of the subject vehicle, and that plaintiff should seek further verification and documentation of City Ford's involvement from City Ford itself. There was no indication that City Ford Company was liable for plaintiff's injuries. A more accurate statement would have been to declare that upon receipt of the July 9, 1984, letter from counsel for United Parcel Service the plaintiff discovered the identity and *potential* liability of City Ford Company, and the fact that they may be a possible tortfeasor.

In an attempt to comply with the provisions of *F.R.C.P.* §§ 11, 19 and 20, plaintiff served a subpoena duces tecum re deposition on the Custodian of Records for City Ford Company to determine if, in fact, City Ford Company had any involvement in the distribution, installation, design and/or manufacture of the defective seat restraint system and/or seat assembly, and thereby allow City Ford Company the opportunity to refute any allega-

tions of possible liability for this accident. It was not until August 30, 1984, after the granting of the summary judgment in favor of FORD MOTOR COMPANY that plaintiff was informed by City Ford Company that it was no longer in possession of any information or documentation with regard to the subject vehicle in that their record retention policy required that all records be destroyed after three years (see Exhibit "G"). To date, plaintiff is still unable to fully determine the extent of City Ford Company's involvement in the distribution, design, manufacture or installation of the defective parts into the subject vehicle, and therefore to have attempted to join City Ford Company on or about July 10, 1984, just after FORD MOTOR COMPANY filed its Motion for Summary Judgment, would clearly have been considered misjoinder for the sole purpose of defeating diversity, a technique clearly discouraged by the district court, and also a clear violation of *F.R.C.P.* § 11 as plaintiff and his counsel at that time were without sufficient grounds to state that to the best of their knowledge, information and belief, there was good grounds to support motions to amend plaintiff's complaint or joinder at that time.

The purpose of serving the subpoena duces tecum re deposition on the Custodian of Records for City Ford Company was to comply with the provisions of *F.R.C.P.* §§ 11, 19 and 20 by affording City Ford Company the opportunity to refute any allegation of possible liability and avoid attempted joinder of a possible tortfeasor whose involvement was unclear, which would have been an abuse of process exposing plaintiff to a potential malicious prosecution lawsuit.

However, having given City Ford Company the opportunity to refute any allegations of possible liability and given its failure to do so, this declarant can now state to the best of his knowledge, information and belief, that City Ford distributed the subject vehicle and that further discovery in the form of interrogatories and depositions of personnel with City Ford at the time of the distribution of the subject vehicle is the only means by which City Ford's complete involvement with the seat restraint system and seat assembly can be ascertained.

To date, and by means of discovery and investigation, plaintiff has been able to determine that City Ford Company was the possible distributor of the subject vehicle and that General Seat and Sash Company of Tomp-
ton, Pennsylvania, manufactured the seating system incorporated into the subject vehicle. It has been inferred that Grumman-Olson Corporation of California manufactured the body of the vehicle incorporated with the chassis manufactured by FORD MOTOR COMPANY, however no documentation or evidence has yet been produced to verify this information. The only means plaintiff has to determine those parties truly liable for his injuries is to proceed with his lawsuit against these possible tortfeasors to determine what information or knowledge they have with regard to the design, manufacture and installation of the defective seat and seat restraint system incorporated in the subject vehicle. To date, as a result of what appears to be a termination of this lawsuit at the district court level, plaintiff has been unable to determine the designer, manufacturer or installer of the seat restraint system which is alleged to have been, in part, a cause of plaintiff's severe and permanent disabling injuries.

Due to the fact that summary judgment was granted in favor of the sole defendant known to the plaintiff at the time of filing of this action, and due to the fact that the one year statute of limitations period has run in the Superior Court (although plaintiff diligently filed his causes of action against unknown Doe defendants prior to the one year statute of limitations period) the court has apparently barred the plaintiff from pursuing claims against City Ford Company, Grumman-Olson Company, General Seat and Sash Company, and others still unknown to the plaintiff at this time.

As plaintiff was diligent in filing his complaint for damages against FORD MOTOR COMPANY and other unknown defendants before the one year statute of limitations period expired, plaintiff should not be precluded from pursuing claims against defendants he has identified through discovery and investigation after the one year statute of limitations period expired, and after the August 20, 1984, summary judgment determination as to FORD MOTOR COMPANY, only, the only known defendant at that time.

In summary, plaintiff requests this court look at the facts of this case in their entirety and make a determination that is fair and just to all parties involved. The plaintiff was injured through no apparent fault of his own. Obviously, someone is liable for these injuries based on the theory of strict liability. Plaintiff diligently and timely filed his summons and complaint for damages before the one year statute of limitations period expired. However, his complaint was removed to the district court by FORD MOTOR COMPANY after the one year statute of limitations period expired. Thereafter, a summary judgment

was granted in favor of FORD MOTOR COMPANY, apparently barring the plaintiff from pursuing this matter further at the district court level and at the superior court level. Plaintiff cannot now go back to the superior court and file a new action against other possible tortfeasors as the one year statute of limitations period expired on March 1, 1984, before the date FORD MOTOR COMPANY removed this action to the district court.

Therefore, plaintiff respectfully requests that this court grant plaintiff's Motion for Relief from Judgment or Order so that it may thereafter properly rule on plaintiff's motions to (a) amend his complaint, (b) join additional parties, and (c) remand this matter to the superior court. By doing so, the court will have used its discretion to allow the plaintiff to pursue this matter based on the merits rather than to allow those parties responsible for plaintiff's severe and permanent injuries to escape liability, creating only further hardship to the plaintiff.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of January, 1985, at Los Angeles, California.

GREENE, O'REILLY,
BROILLET, PAUL, SIMON,
McMILLAN, WHEELER
& ROSENBERG

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Declarant

(Certificate of Service omitted in printing)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Caption omitted in printing)

No. 84-6389

DC # CV 84-2049-PAR

Central California

ORDER

(Filed January 22, 1985)

Before: BARNES, Circuit Judge

On December 20, 1984, the district court indicated that it would entertain appellant's motion for reconsideration and for other relief on remand. Accordingly, this case is remanded to the district court for a period of 90 days or until the district court decides appellant's motions, whichever occurs first. On remand, the district court may consider appellant's renewed motion for reconsideration and may consider anew the district court's order of November 21, 1984, which was filed while this appeal was pending and the district court was thereby divested of jurisdiction. The motion to vacate is denied without prejudice to renewal, if necessary, following the remand.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. CV 84-2049 PAR

Date 1/22/85

Title Gary Bryant -v- Ford Motor Co.

DOCKET ENTRY

PRESENT:

HON. PAMELA ANN RYMER, JUDGE

Linda Orona
Deputy Clerk

No Appearance
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Not Present

ATTORNEYS PRESENT FOR DEFENDANTS:

Not Present

PROCEEDINGS: MOTION TO RECONSIDER.

For the reasons stated the Court's decision on November 21, 1984, plaintiff's motion to reconsider is *DENIED*.

cc: counsel of record.

Initials of Deputy Clerk: LO

No. 84-6389

In The
UNITED STATES COURT OF APPEALS
For The Ninth Circuit

(Caption omitted in printing)

**APPEAL FROM ORDER
GRANTING SUMMARY JUDGMENT**

**OPPOSITION OF DEFENDANT-APPELLEE
FORD MOTOR COMPANY TO MOTION FOR LIMITED
REMAND AND MOTION TO VACATE;
DECLARATION OF RICHARD A. GOETTE**

(Filed January 22, 1985)

**HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK,
VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, California 90017
Attorneys for Appellee
Ford Motor Company**

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	ii
I. Preliminary Statement	1
II. Statement of Material Facts	1
III. Pertinent Authorities Do Not Require a "Limited Remand"	6
IV. Ford is Entitled to the Amount of the Reasonable Expenses Incurred Due to the Filing of the Pending Motion	10
V. Conclusion	12

TABLE OF AUTHORITIES

<i>CASES</i>	<i>Page(s)</i>
<i>Canadian Ingersoll-Rand v. Peterson Products</i> , 350 F.2d 18 (9th Cir. 1965)	7
<i>Corex Corp. v. United States</i> , 638 F.2d 119 (9th Cir. 1981)	7, 9
<i>Crateo, Inc. v. Intermark, Inc.</i> , 536 F.2d 862 (9th Cir. 1976)	8, 9
<i>Grigg v. Southern Pacific Co.</i> , 246 F.2d 613 (9th Cir. 1957)	10
<i>Klapprott and Ackermann v. United States</i> , 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950)	9
<i>Long v. Bureau of Economic Analysis</i> , 646 F.2d 1310 (9th Cir. 1981) vacated on other grounds, 454 U.S. 934 (1981)	7
<i>Lopez v. General Motors Corp.</i> , 697 F.2d 1328 (9th Cir. 1983)	10
<i>Martella v. Marine Cooks and Steward Union</i> , <i>Seafarer's Int. Union</i> , 448 F.2d 729, 730 (9th Cir. 1971)	9
<i>Palomo v. Baba</i> , 497 F.2d 959 (9th Cir. 1974)	7
<i>Roque v. City of Redlands</i> , 25 F.R.Serv.2d 1519 (D.C. Calif. 1978)	10
<i>Smith v. Lujan</i> , 588 F.2d 1304 (9th Cir. 1979)	8
<i>Standard Oil Co. of California v. United States</i> , 429 U.S. 17, 18 (1976)	8
 <i>FEDERAL RULES</i>	
Fed. R. Civ. P. 11	11
Fed. R. Civ. P. 60(b)	1, 4, 5, 6 7, 8, 9
Fed. R. Civ. P. 60(b)(5)	8
Fed. R. Civ. P. 60(b)(6)	7, 9, 10

I. Preliminary Statement

Plaintiff-appellant inexplicably seeks a "limited remand" of this action to somehow allow the lower court to reconsider a motion under Rule 60(b)(6) that was previously considered and denied after the appeal was filed. The relief sought is simply a thinly veiled substitute for prosecuting the pending appeal in an attempt to undo decisions rendered by the lower court with which plaintiff is dissatisfied. The motions are manifestly inappropriate, have caused an unnecessary delay in these proceedings and should be denied. We respectfully submit that the motions are unwarranted and that the reasonable expenses incurred in opposing them should be awarded to defendant-appellee Ford Motor Company ("Ford").

II. Statement of Material Facts

This dispute arises from a relatively uncomplicated personal injury action in which plaintiff contends that on March 1, 1983, while in the course and scope of his employment with United Parcel Service, Inc. and while driving a 1968 truck owned by his employer, he was involved in a single vehicle accident. As a consequence of the accident, plaintiff reportedly sustained certain personal injuries and approximately eleven months later, on January 27, 1984, plaintiff filed a third-party complaint in the Superior Court for the County of Los Angeles, California. That complaint, which contained claims for relief premised upon negligence, breach of warranty and strict liability was served on Ford on March 1, 1984.

In the complaint, plaintiff, a California resident, named Ford as the only defendant based upon plaintiff's appar-

ent belief that the truck was designed or manufactured by Ford. However, there was no indication in the complaint as to the particular basis for plaintiff's claims—merely that the vehicle was a Ford product and was purportedly defective. While the complaint also named Does 1 through 50, plaintiff alleged no facts which identified those defendants, nor did plaintiff allege where any of the Doe defendants were domiciled or resided. Since Ford is incorporated in Delaware and has its principal place of business in Michigan, Ford petitioned for the removal of the action on March 29, 1984, based upon diversity jurisdiction.

Pretrial discovery conducted by Ford ultimately revealed the basis of plaintiff's vague liability contentions. In essence, plaintiff claimed that he sustained injuries due to the inadequacy of both the seatbelt system in the vehicle and the driver's seat and therefore contended that the design and manufacture of the vehicle was defective. In an effort to evaluate plaintiff's contentions, Ford thereafter arranged to inspect the vehicle on May 10, 1984. The inspection revealed that *only* the chassis was a Ford product; the body of the vehicle, including the seatbelt system and driver's seat, were not designed, manufactured or assembled by Ford.

Since it had no responsibility whatsoever for the vehicle components which plaintiff claimed were defective, Ford prepared and filed a motion for summary judgment and summary adjudication of issues. That motion was filed on July 9, 1984, and described the basis for Ford's lack of any conceivable liability. The motion was fully supported by an affidavit from a Ford engineer who had examined the vehicle. A hearing to consider the motion was not scheduled until August 20, 1984.

During the period before the motion was heard and although Ford's motion explained that it had no liability, plaintiff failed to seek to amend his complaint or to stay the motion. In his opposition to the motion, plaintiff merely indicated that he would like to conduct discovery to determine who was responsible for the allegedly defective seat and restraint system. That contention, of course, was no basis for denying the motion. On August 20, the lower court heard and granted Ford's motion for summary judgment and summary adjudication of issues. Plaintiff never sought to join any other defendant until after final judgment was entered by the lower court on August 27, 1984.

Plaintiff does not now seek to challenge the judgment entered for Ford. Instead, the basis of the pending motion is revealed by plaintiff as follows:

"It was understood by counsel for the plaintiff at the hearing of this motion of August 20, 1984, that summary judgment was granted as to Ford Motor Company *only*, and that plaintiff would be allowed to name additional defendants in that matter"

Motion, p. 3 (Emphasis added.)

This empty assertion has seemingly triggered a series of actions by plaintiff in the lower court after entry of judgment.

Due to the erroneous belief that the lower court still had jurisdiction and on August 29, 1984, for example, plaintiff filed a motion for leave to join additional defendants or, in the alternative, for a remand of the action to state court. Plaintiff essentially claimed that he had final-

ly determined the identity of at least three additional defendants and that the matter should be remanded. Although plaintiff did not choose to serve his motion on Ford, the lower court properly ruled, on September 28, 1984, that because it lacked jurisdiction over the matter, no action would be taken to consider the motion except pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. In the meantime, plaintiff had filed a notice of appeal to this Court on September 26, 1984.

Despite the appeal and apparently believing that the lower court had offered a solution to his dilemma, plaintiff continued in his struggle to excuse his lack of diligence and undo the judgment. On October 4, 1984, plaintiff filed a motion for relief under Rule 60(b) or, in the alternative, to reconsider the granting of the summary judgment under the local rules of the Central District. Once again, plaintiff declined to serve Ford. Once again, similar to the prior motions and without challenging the summary judgment entered for Ford, plaintiff requested an opportunity to name additional defendants. Once again, counsel representing plaintiff attempted to excuse his lack of diligence by arguing that he "understood" that the judgment was somehow limited to allow him an opportunity to name new defendants.

After again considering the same arguments and on November 20, 1984, the lower court denied plaintiff's motion. In its memorandum opinion of November 21, the lower court expressly pointed out that plaintiff's persistent argument that judgment was entered "only" as to Ford failed to appreciate that, under federal practice, there was nothing left of the action. The lower court also

noted that plaintiff admittedly knew the identity of at least one potential defendant more than one month prior to the summary judgment hearing. There was simply no justification to set aside the judgment.

Instead of pursuing this appeal, plaintiff next scheduled a status conference with the lower court on December 20, 1984. While the purpose of that conference is unclear, it appears that plaintiff finally concluded that the notice of appeal divested the lower court of jurisdiction. As a consequence, plaintiff sought the agreement of the lower court to somehow reconsider its denial of the previously filed motion to set aside the judgment under Rule 60(b) if this Court would permit the necessary jurisdiction.

Plaintiff thus seeks a "limited remand" from this Court which will somehow permit:

"[t]he district court to reconsider plaintiff's motions previously filed, allowing the plaintiff to pursue claims against other possible tortfeasors so that he may be compensated for his severe and permanent disabling injuries."

(Motion, p. 11.)

It therefore appears that plaintiff now wants the assistance of this Court to do what was previously determined to be impermissible by the lower court. How plaintiff expects to now excuse himself for failing to name the proper defendants through this procedure remains a mystery. Beyond being entirely unsupported by any facts, the contentions raised by plaintiff are not endorsed by the authorities.

III. *Pertinent Authorities Do Not Require a "Limited Remand"*

Plaintiff's motions seem to suggest that a limited remand will somehow automatically allow him to amend his complaint to join additional defendants and then somehow allow the action to be remanded to state court. Such a contention is no less than astonishing and it is most certainly not supported by the authorities. The lower court has already considered plaintiff's arguments under Rule 60(b) and found them unpersuasive.

As a preliminary matter, the Ninth Circuit has generally held that the filing of a notice of appeal divests the trial court of jurisdiction to consider a motion under Rule 60(b) without a remand from the appellate court. *See Palomo v. Baba*, 497 F.2d 959 (9th Cir. 1974); *Canadian Ingersoll-Rand Co. v. Peterson Products*, 350 F.2d 18 (9th Cir. 1965). In addition, a moving party is ordinarily expected to ask the lower court to first indicate whether it wishes to entertain the motion or to grant it and then to move the appellate court for a remand. *See Long v. Bureau of Economic Analysis*, 646 F.2d 1310 (9th Cir. 1981) vacated on other grounds, 454 U.S. 934 (1981). However, in this instance, the lower court has already fully considered and expressly denied plaintiff's motion under Rule 60(b)(6).

The plain fact is that leave of this Court is not required to have the lower court reconsider a motion under Rule 60(b). *See Corex Corp. v. United States*, 638 F.2d 119 (9th Cir. 1981), which involved a suit for the refund of excise taxes. The lower court entered judgment for

the government and, thereafter, the taxpayer filed a motion for relief from the judgment under Rule 60(b)(6).

“The district court mistakenly believed that leave from this Court was required before it could rule upon taxpayer’s motion. The taxpayer petitioned this Court on behalf of the district court for permission to hear the taxpayer’s motion. [Thereafter] this Court denied the request, stating that there was nothing before the Court and that permission from this Court to hear such a motion was not necessary.”

638 F.2d at 121.

See also Standard Oil Co. of California v. United States, 429 U.S. 17, 18 (1976) (“We hold that the District Court may entertain a Rule 60(b) motion without leave by this Court In our view, the arguments in favor of requiring appellate leave are unpersuasive.”).

Plaintiff has cited *Smith v. Lujan*, 588 F.2d 1304 (9th Cir. 1979), and *Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862 (9th Cir. 1976), for the proposition that the “proper procedure” is to first seek an order from this Court to allow the lower court to reconsider the previously decided motion. While we find it curious that plaintiff now suddenly seeks to follow the correct procedure, his citation to these authorities is unanalyzed.

Smith v. Lujan, *supra*, involved an action by a lessee against the lessor’s heirs for the reexecution of a lost lease. The lower court ordered reexecution of the leases and the lessor appealed. After filing the notice of appeal, a Rule 60(b)(5) motion was made in the lower court where it was “entertained and denied.” Appellants then sought to appeal that denial. While the appellate court observed

that appellants should have first asked the lower court if it wished to entertain the motion and then to seek a remand, it also held as follows:

“We are aware of the district court’s intent to deny relief as requested in the Rule 60(b) motion, and in the interest of judicial economy, we are inclined in this case, to treat the notice of appeal from the Rule 60(b) order as a motion for remand. In that framework, we will consider the arguments made in appellants’ motion.”

588 F.2d at 1307.

The Court then considered and denied the motion.

Crateo, Inc. v. Intermark, Inc., 536 F.2d 862 (9th Cir. 1976), addressed a similar situation where an appellant “appealed” from a lower court’s order that it was inappropriate for it to either grant or entertain a Rule 60(b) motion. The appeal was ultimately considered as a motion for remand of the case for consideration under Rule 60(b). The appellate court then declined to order a remand. It is indeed perplexing to understand how these cases assist plaintiff.

Beyond attempting to invoke a cumbersome and inappropriate procedure, we moreover note that plaintiff has not and cannot meet his burden to establish that the judgment should be set aside under Rule 60(b)(6) which allows a party to be relieved from a judgment for “any other reason justifying relief from the operation of the judgment.” A moving party’s burden under Rule 60(b)(6) is difficult. *See, e.g., Corex Corp. v. United States*, 638 F.2d 119 (9th Cir. 1981).

“[Moving party] argues that clause (6) should be applied liberally, but the authorities indicate other-

wise. Together, *Klapprott and Ackermann v. United States*, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950), hold that clause (6) is reserved for 'extraordinary circumstances.' *Id.* at 199, 71 S.Ct. at 212. This circuit has followed this view. See *Martella v. Marine Cooks and Steward Union, Seafarer's Int. Union*, 448 F.2d 729, 730 (9th Cir. 1971)."

638 F.2d at 141.

Any motion under a Rule 60(b)(6) must be considered by a very narrow standard and such a motion cannot be used as a substitute for appeal. See *Roque v. City of Redlands*, 25 F.R.Serv.2d 1519 (D.C. Calif. 1978) ("[T]he plaintiff has not met his burden of demonstrating the necessary 'exceptional and compelling circumstances' which will justify relief under Rule 60(b)(6). Rather, the plaintiff's proper remedy would lie by way of appeal.").

We would finally observe that there is no merit to plaintiff's suggestion that his belated identification of an additional party would allow the action to be remanded to state court. Under similar circumstances, this Court has not permitted such a maneuver. See *Lopez v. General Motors Corp.*, 697 F.2d 1328 (9th Cir. 1983).

"Counsel here says that he did try to identify the dealer who sold the truck, but he never told that to the court, or mentioned the unidentified dealer in his complaint or otherwise until more than six months after the action was removed and just four days before the motion for summary judgment was to be heard. A fortiori, this, too, was too late."

697 F.2d at 1332.

See also *Grigg v. Southern Pacific Co.*, 246 F.2d 613, 620 (9th Cir. 1957) ("[Counsel] never attempted to identify or

charge a Doe until he found he was in trouble—his case was going to a court where he preferred not to go. This was too late.”).

IV. *Ford is Entitled to the Amount of the Reasonable Expenses Incurred Due to the Filing of the Pending Motion*

The sequence of events precipitating the pending motion demonstrates a chronic inability to appreciate or even consider the rules of federal practice. These proceedings are and continue to be costly to Ford. We therefore respectfully request the imposition of sanctions.

While the rules of this Court are silent as to available remedies for such sanctionable conduct here, Rule 11 of the Federal Rules of Civil Procedure provides guidance.

“The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law . . .* and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”

(Emphasis added.)

Rule 11 also provides a remedy for violation of this provision.

“If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable

expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

Ford submits that this dispute is palpably unnecessary and that it should be awarded the costs incurred in opposing the motions.

V. Conclusion

There is no reason to grant plaintiff's motions under the procedures of this Court. Plaintiff is merely seeking unnecessary and inappropriate permission to have the lower court reconsider that which it has already decided. There is simply no basis for the pending motions. Ford requests that this Court deny the motions in their entirety and award its costs incurred in opposing these motions.

Dated: January 18, 1985.

Respectfully submitted,
HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK,
VERLEGER & SHEA

/s/ Richard A. Goette
Richard A. Goette

Attorneys for Defendant and
Appellee Ford Motor Company

DECLARATION OF RICHARD A. GOETTE

I, RICHARD A. GOETTE, hereby declare as follows:

1. I am an attorney at law admitted to practice before this Court and am a member of McCutchen, Black,

Verleger & Shea, counsel for Ford Motor Company in this action. I make this declaration in opposition to the motions of plaintiff for a limited remand and to vacate. I have personal knowledge of all the facts contained herein and could testify to them if called as a witness in this action.

2. This is a personal injury action in which plaintiff contends that on March 1, 1983, while in the course and scope of his employment with United Parcel Service, Inc. and while driving a 1968 truck owned by his employer, he was involved in a single vehicle accident.

3. On January 27, 1984, plaintiff filed an action for damages in the Superior Court of the State of California for the County of Los Angeles. That action named as defendants only Ford Motor Company and Does 1 through 50.

4. The summons and complaint were first received by Ford through its authorized representative on March 1, 1984. Since the action was between citizens of different states, since the amount in controversy exceeded the sum of \$10,000 and since there was no attempt to identify the Doe defendants, Ford petitioned for removal on March 29, 1984.

5. While the complaint did not explain the basis for plaintiff's negligence, warranty and strict liability claims, Ford ultimately determined through discovery that plaintiff allegedly sustained personal injuries due to a defective driver's seat and restraint system in the vehicle.

6. On May 10, 1984, Ford arranged for an engineering inspection of the subject vehicle. That inspection confirmed that Ford built *only* the chassis of the vehicle in

question. It was not connected in any way with the body of the vehicle, including the restraint system or the driver's seat which were implicated in this action and allegedly caused the injuries sustained by plaintiff.

7. On July 9, 1984, Ford filed a motion for summary judgment and for summary adjudication of issues. That motion was fully supported by an engineer from Ford who had inspected the subject vehicle. A hearing in connection with Ford's motion was not scheduled until August 20, 1984.

8. At no time prior to the hearing on August 20 did plaintiff seek to amend his complaint to add additional defendants who he contended were responsible, in whole or in part, for his alleged injuries, or to stay the motion.

9. On August 20, 1984, the lower court heard and granted the motion for summary judgment and summary adjudication of issues. Final judgment was entered on August 27, 1984.

10. At no time prior to entry of judgment did plaintiff seek to join any additional defendants who he contended were responsible, in whole or in part, for his alleged injuries.

11. On August 29, 1984, plaintiff filed a motion in the lower court for leave to join additional defendants or, in the alternative, for a remand of the action to state court. Although Ford was not served with that motion, plaintiff essentially claimed that he had finally determined the identity of at least three additional defendants and that the matter should be somehow remanded.

12. On September 28, 1984, the lower court ruled on plaintiff's motion to remand the action to state court and held that it had no jurisdiction over the action, except pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and that no action would be taken on the motion.

13. On September 26, 1984, plaintiff filed a notice of appeal to this Court.

14. On October 4, 1984, plaintiff filed a motion for relief under Rule 60(b)(6) or, in the alternative, to reconsider the granting of the summary judgment under the local rules of the Central District. Similar to the previous motion, plaintiff declined to serve Ford.

15. On November 21, 1984, the lower court denied plaintiff's motion. In its memorandum opinion, the lower court pointed out that plaintiff's argument that judgment was entered "only" as to Ford failed to appreciate that, under federal practice, there was nothing left of the action.

16. At the request of plaintiff and on December 20, 1984, the lower court agreed to convene a status conference. The lower court then explained that if the appellate court granted a partial remand of the matter, it would simply enter its previous ruling in connection with plaintiff's motion to reconsider. The lower court also expressed the belief that there was no reason to "reentertain" the motion.

17. The cost of opposing the pending motion has amounted to in excess of \$750.00.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of January, 1985, at Los Angeles, California.

/s/ Richard A. Goette
Richard A. Goette

(Proof of Service omitted in printing)

No. 84-6389

In The
UNITED STATES COURT OF APPEALS
For The Ninth Circuit

(Caption omitted in printing)

APPEAL FROM ORDER
GRANTING SUMMARY JUDGMENT

SUPPLEMENTAL DECLARATION OF RICHARD A.
GOETTE IN OPPOSITION TO MOTION FOR
LIMITED REMAND AND MOTION TO VACATE

(Received January 25, 1985)

HOWARD J. PRIVETT
RICHARD A. GOETTE
McCUTCHEN, BLACK,
VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, California 90017

Attorneys for Appellee
Ford Motor Company

DECLARATION OF RICHARD A. GOETTE

I, RICHARD A. GOETTE, hereby declare as follows:

1. I am an attorney at law admitted to practice before this Court and am a member of McCutchen, Black, Verleger & Shea, counsel for Ford Motor Company in this action. I make this declaration in opposition to the motions of appellant for a limited remand and to vacate. I have personal knowledge of all the facts recited herein.

and could testify to them if called as a witness in this action.

2. For this Court's reference and convenience, attached is a copy of the reporter's transcript of proceedings obtained in connection with the status conference on December 20, 1984.

3. I attended that status conference and believe that the attached transcript accurately sets forth the statements made by the lower court and counsel.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of January 1985, at Los Angeles, California.

/s/ Richard A. Goette
Richard A. Goette

[Attachment: Reporter's Transcript of Proceedings
on December 20, 1984, see at pp. 176-186.]

GREENE, O'REILLY, BROILLET, PAUL, SIMON,
McMILLAN, WHEELER & ROSENBERG

Lawyers

Los Angeles Office

816 South Figueroa Street

Los Angeles, California 90017-2516

(213) 482-1122

(213) 482-1350

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption omitted in printing)

CASE NO. C 84 2049 PAR (mex)

NOTICE OF REMAND; DECLARATION OF
TIMOTHY J. WHEELER

Pursuant to the Order filed by the United States Court of Appeals for the Ninth Circuit, on January 22, 1985, and attached hereto as Exhibit "1", plaintiff hereby requests that this Court not only reconsider plaintiff's Motion for Reconsideration previously filed, but also the Supplemental Declaration of Timothy J. Wheeler, previously filed on January 11, 1985, and attached hereto as Exhibit "2".

DATED: January 28, 1985

Respectfully submitted,
GREENE, O'REILLY, BROILLET,
PAUL, SIMON, McMILLAN,
WHEELER & ROSENBERG

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Attorneys for Plaintiff,
GARY BRYANT

EXHIBIT "1"

[U.S. Court of Appeals Order filed January 22, 1985,
see at p. 212.]

EXHIBIT "2"

[Supplemental Declaration of Timothy J. Wheeler,
filed January 11, 1985, see at pp. 201-211.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. CV 84-2049 PAR

Date 2/8/85

Title Gary Bryant -v- Ford Motor Co.

DOCKET ENTRY

PRESENT:

HON. PAMELA ANN RYMER, JUDGE

Linda Orona

No Appearance

Deputy Clerk

Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Not Present

ATTORNEYS PRESENT FOR DEFENDANTS:

Not Present

PROCEEDINGS:

The Court has carefully considered plaintiff's motion to reconsider. Waiving oral argument pursuant to Local Rule 7.11, the Court now Finds that plaintiff's motion should be *DENIED*.

cc: counsel of record.

Initials of Deputy Clerk LO

GREENE, O'REILLY, BROILLET, PAUL, SIMON,
McMILLAN, WHEELER & ROSENBERG

Lawyers

Los Angeles Office

816 South Figueroa Street

Los Angeles, California 90017-2516

(213) 482-1122

(213) 482-1350

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. C 84 2049 PAR (mcx)

NOTICE OF APPEAL

(Caption omitted in printing)

TO THE CLERK OF THE ABOVE-ENTITLED
COURT:

NOTICE IS HEREBY GIVEN that plaintiff, GARY BRYANT, hereby appeals to the Federal Court of Appeal for the Ninth Circuit from this Court's Order denying plaintiff's Motion for Reconsideration and Motions for Remand, Joinder and Amendment of His Complaint, entered herein on February 8, 1985, against the plaintiff, GARY BRYANT, providing as follows:

See Exhibit "A" attached hereto.

Notice shall be given to FORD MOTOR COMPANY, by and through its attorneys of record, McCutchen, Black, Verleger & Shea, 600 Wilshire Blvd., Los Angeles, California, Attention: Richard Goette, Esq.

DATED: February 15, 1985

GREENE, O'REILLY, BROILLET,
PAUL, SIMON, McMILLAN,
WHEELER & ROSENBERG

By /s/ Timothy J. Wheeler
TIMOTHY J. WHEELER
Attorneys for Plaintiff,
GARY BRYANT

EXHIBIT "A"

[United States District Court filed February 8, 1985;
see at p. 235.]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Caption omitted in printing)

Nos. 84-6389
85-5698

DC # CV-84-2049 PAR
Central California

ORDER

(Filed May 3, 1985)

On April 23, 1985, a Prebriefing Conference was held before Conference Attorney Joshua R. Steinhauer. Appellant was represented by Michael Goldberg and George Rosenberg. Appellees were represented by Richard Goette.

- (1) These appeals are consolidated.
- (2) Appellant shall file a brief of not more than 25 pages on or before June 3, 1985.
- (3) Appellees shall file a brief of not more than 25 pages on or before July 8, 1985.
- (4) Appellant may file a reply brief of not more than 10 pages within 21 days of the service date of appellees' brief.

This order is subject to reconsideration by a judge if any objection is filed within 10 days of the entry of the order.

FOR THE COURT,
/s/ Joshua R. Steinhauer
Joshua R. Steinhauer
Conference Attorney

4.30/10

Gary BRYANT, Plaintiff-Appellant,

v.

FORD MOTOR CO.,
Defendant-Appellee.

Nos. 84-6389, 85-5698.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 5, 1985.

Decided July 11, 1986.

As Amended July 18 and Aug. 4, 1986.

Consumer brought state court personal injury action against automobile manufacturer and 50 Doe defendants, alleging negligence, breach of warranty and strict liability. Automobile manufacturer removed action to federal court. The United States District Court for the Central District of California, Pamela Ann Rymer, District Judge, entered summary judgment for automobile manufacturer, and defendant appealed. The Court of Appeals, Cynthia Holcomb Hall, Circuit Judge, held that removal of action which named real but unidentified people or entities as Doe defendants was premature.

Vacated and remanded with directions.

Wallace, Circuit Judge, filed concurring opinion.

Michael L. Goldberg, Washington, D.C., for plaintiff-appellant.

Richard A. Goette, McCutchen, Black, Verleger & Shea, Los Angeles, Cal., for defendant-appellee.

Appeal from the United States District Court Central District of California.

Before WALLACE, HUG, and HALL, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge:

Plaintiff-appellant Gary Bryant appeals from the decision of the district court granting summary judgment in favor of defendant-appellee Ford Motor Company. We conclude that the district court lacked jurisdiction over this action because of the presence of potentially non-diverse Doe defendants at the time of removal from state court.

I

Bryant originated this action for negligence, breach of warranty, and strict liability in California state court against Ford and Does 1 through 50. Ford removed the action to the United States District Court for the Central District of California.

Bryant seeks recovery for injuries he sustained in an accident while driving a Ford van for United Parcel Service on March 1, 1983. Bryant contends that the passive restraint system in the van was defective because it did not include a shoulder harness. Bryant's complaint alleges that Does 1 through 50 are related to each other and to Ford as "agents, servants, employees and/or joint venturers." Bryant claims that Ford and each of the Does

were involved in the design, production, inspection, and distribution of the van which Bryant was driving at the time of the accident.

A joint inspection of the van by the parties on May 10, 1984, revealed that Ford had produced only the chassis of the van. The body and other components, including the passive restraint system, were produced by other companies as part of the joint venture. The companies responsible for producing the component parts could not be identified at the time of removal or the time of inspection because the van was produced in 1968 and Ford destroys records of this type after ten years. Bryant subsequently identified City Ford Company as the seller of the van, General Seating and Sash Company (General Seating) as the producer of the seats, and Grumman-Olson Company as the producer of the body. City Ford and Grumman-Olson are California corporations.

The district court granted Ford's motion for summary judgment, concluding that there were no material facts as to Ford's liability because of the inspection evidence that Ford was not involved in the production of the passive restraint system. Bryant then moved the court to add City Ford, General Seating, and Grumman-Olson to the cause of action. The district court refused Bryant's motion, finding that the presence of non-diverse parties was not new evidence justifying relief from judgment under Rule 60(b). Bryant appealed the grant of summary judgment. We granted a limited remand at Bryant's request for the district court to gain reconsider its previous rulings. The district court again refused to join the additional parties, and this appeal of the district court's rulings followed.

II

The presence of unidentified Doe defendants at the time of removal creates difficulties for federal courts in determining whether diversity jurisdiction is present, and hence whether removal is proper. Despite state law rules of procedure which permit the filing of actions against Doe defendants without any evidence of the Doe's identity, *see, e.g.*, Cal. Code Civ.Proc. § 474, the district court must determine the identity and citizenship of Doe defendants in order to evaluate diversity of citizenship. *See, e.g., Hartwell Corp. v. Boeing Co.*, 678 F.2d 842, 842-43 & n. 1 (9th Cir.1982); *Chism v. National Heritage Life Insurance Co.*, 637 F.2d 1328, 1330 (9th Cir.1981). Ordinarily the presence of Doe defendants defeats diversity jurisdiction. *Othman v. Globe Indemnity Co.*, 759 F.2d 1458, 1462 (9th Cir.1985). We have recognized exceptions to this rule when the Does are wholly fictitious, *see, e.g., Grigg v. Southern Pacific Co.*, 246 F.2d 613, 619 (9th Cir.1957), or when the charges against the Does are so general that no clue is given as to their identity or their relationship to the cause of action, *see, e.g., Hartwell*, 678 F.2d at 842-43; *Chism*, 637 F.2d at 1330.¹ The rationale

1. In *Othman*, 759 F.2d at 1462 n. 7, we noted some confusion in our previous decisions regarding whether the district court should examine the specificity with which the Does have been pleaded in determining whether removal is appropriate or whether the presence of Does always defeats diversity jurisdiction, and hence removal. A close examination indicates that our previous decisions are reconcilable. In dicta in *Preaseau v. Prudential Ins. Co.*, 591 F.2d 74, 77 n. 2 (9th Cir. 1979), we questioned whether the specificity of Doe pleadings ever should be examined, but actually held that specificity would not be considered in determining whether defendant's

for both of these exceptions is a balance between the limited jurisdiction of federal courts and the need to prohibit plaintiffs who initiate actions in state court from defeating removal jurisdiction by the use of pleading fictions.

The exception for wholly fictitious Does simply recognizes that diversity jurisdiction, and hence the availability of removal, cannot possibly be affected by Does which are included in the state court complaint as a matter of course even though no other possible parties to the action exist. As we stated in *Grigg*, "Does [who] live not and are accused of nothing, should not divert the course of justice." 246 F.2d at 620. When the Does in state court pleadings are wholly fictitious, the federal district court can judge diversity on the basis of the citizenship of the named parties to the action without fear that its determination will be affected by the later discovery of non-diverse parties.

The exception for Doe pleadings which give no clue as to the identity of the Does or their relationship to the cause of action is essentially a practical application

(Continued from previous page)

petition for removal after Does had been dismissed from the action was timely, id. at 76-79 & n. 2. Our holding in *Preaseau* prohibits plaintiffs from using Doe pleadings to trap defendants into untimely petitions for removal. *Preaseau* does not address the situation in which a defendant comes forward within the initial thirty days permitted by 28 U.S.C. § 1446(b) and claims that removal is appropriate because the Does are fictitious. *Id.* at 77 n. 2. When a defendant comes forward with such allegations we have consistently examined the specificity of the Doe pleadings to determine diversity and the availability of removal. See *Hartwell*, 678 F.2d at 842-43 & n. 1; *Chism*, 637 F.2d at 1330; *Grigg*, 246 F.2d at 620; *Southern Pacific Co. v. Haight*, 126 F.2d 900, 904 (9th Cir.), cert. denied, 317 U.S. 676, 63 S.Ct. 154, 87 L.Ed. 242 (1942).

of the exception for wholly fictitious Does. In some instances the Doe pleadings are so general that the district court may conclude that the Does do not exist or do not have any relationship to the action even though the parties have not conceded that the Does are fictitious. For example, if the Does are mentioned in the caption to the case or listed as parties but no indication is given regarding their identity or how their activities give rise to a cause of action, the district court may conclude that the Does will never be parties to the action and evaluate removal jurisdiction accordingly. *See, e.g., Hartwell*, 678 F.2d at 842 (Does mentioned in caption and described generally as participating in the alleged wrongdoing without any description of their role); *Chism*, 637 F.2d at 1330 (Does not included in any charging allegations); *Asher v. Pacific Power & Light Co.*, 249 F.Supp. 671, 675-77 (N.D. Cal. 1965) (Does not included in charging allegations, and nature of nuisance cause of action indicated that only appropriate defendant was the company, not Does). We emphasize that this is a very limited exception to the general rule that Does defeat diversity jurisdiction, and we will treat it as such. If the pleadings provide *any* information regarding the identity of the Does and their relationship to the action, the district court should remand the case to the state court. *See, e.g., Pullman Co. v. Jenkins*, 305 U.S. 534, 540, 59 S.Ct. 347, 350, 83 L.Ed. 334 (1939) (Doe identified as allegedly negligent porter but citizenship unknown); *Preaseau*, 591 F.2d at 77 n. 2 (Does identified as agents or employees of other defendants)

(dieta).² Once the existence of the Does, their citizenship, and their relationship to the cause of action is defined sufficiently, removal may be sought if the new information establishes that all parties are diverse. *Cf. Preaseau*, 591 F.2d at 76-79 (petition for removal filed immediately after Doe defendants were dismissed from action is timely).

In this case removal was premature because Does 1 through 50 did not fall within the above exceptions. Bryant's complaint identified the Does as agents, employees or joint venturers of Ford. The charging allegations accuse the Does of participating in the allegedly negligent production of the van and its component parts. Both parties recognized that there was a strong possibility that other companies were involved in the production of the van, although the companies could not be identified at the time of removal because records of the joint venture had been destroyed. Because the Does were real but unidentified people or entities the district court could not determine whether the Does would defeat diversity jurisdiction once they were identified, and, therefore, should have remanded the case to the state court. That City Ford and Grumman-Olson turned out to be California corporations which are not diverse as to Bryant demonstrates

2. In order to proceed with maximum caution, it will usually be advisable for the district court to issue an order to show cause why the case should not be remanded to the state court when the state court complaint contains Doe allegations and removal is sought on the basis of diversity. If the party seeking removal claims that the Does are fictitious in its petition for removal or in response to an order to show cause, the district court may also wish to require a response in writing or by hearing from the state court plaintiff who filed the Doe allegations.

the reason for denying removal when allegations against real but unidentified Does are present.³

III

The decision of the district court is VACATED. We REMAND to the district court with instructions to remand to the appropriate state court, each party to bear its own costs for this appeal.

WALLACE, Circuit Judge, concurring:

I concur in the majority opinion except for footnote 2, in which the majority advises the district courts how best to respond to Doe pleadings in petitions for removal. Our responsibility, as I understand it, is confined to interpreting and applying the law to the issues presented to us. We do not possess a general power that authorizes us to advise the district courts which course of action they should select from among the many possible alternatives that fall within legal constraints. Such advice, in my judgment, should be given at judicial seminars and conferences. Although the advice of one or two judges is important, I believe it should not be part of a decision speaking for the entire court.

3. Because we find that removal was improper we do not reach the question of whether the proposed amendment of pleadings to identify City Ford, Grumman-Olson, and General Seating as the Doe defendants relates back to the filing of Bryant's original state court complaint. See *Lindley v. General Electric Co.*, 780 F.2d 797 (9th Cir.1986).



AUG 12 1988

(3)
No. 88-97

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

FORD MOTOR CO.,
Petitioner,
v.
GARY BRYANT,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**MOTION FOR LEAVE TO FILE AND BRIEF OF THE
AMERICAN BAR ASSOCIATION AS AMICUS CURIAE
IN SUPPORT OF PETITION**

ROBERT D. RAVEN *
President,
American Bar Association
BRUCE A. GREEN
MARC M. ARKIN
GREGORY D. HUFFAKER, JR.
750 N. Lake Shore Dr.
Chicago, Illinois 60611
(312) 988-5000
*
Attorneys for
American Bar Association
As Amicus Curiae

August 12, 1988

* Counsel of Record

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-97

FORD MOTOR CO.,

Petitioner,

v.

GARY BRYANT,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**MOTION FOR LEAVE TO FILE
BRIEF OF THE AMERICAN BAR ASSOCIATION
AS *AMICUS CURIAE***

The American Bar Association ("ABA") moves pursuant to Rule 36.1 of the rules of this Court for leave to file the annexed brief as *amicus curiae* in support of the petition for certiorari filed by Ford Motor Co. on or about July 14, 1988. The ABA believes the United States Court of Appeals for the Ninth Circuit in the case below has issued a ruling that would frustrate the proper invocation of diversity jurisdiction and the right of a party to remove a case promptly to federal court in

appropriate cases under the diversity jurisdiction. The case below severely limits a defendant's access to federal court by establishing that the naming of a "John Doe" defendant in a state complaint *per se* precludes removal under the diversity jurisdiction until the "John Does" are dropped from the complaint, which could be years from the initial filing, depending upon state procedural rules.

The ABA wishes to support the petitioner's position that the Ninth Circuit's decision is in error and is important enough to merit plenary review. The ABA believes the attached brief will be of assistance to the Court. Although counsel for petitioner Ford Motor Co. consented to the filing of this brief, the consent of counsel for respondent Bryant was requested but refused. The ABA therefore requests leave to file the annexed brief as *amicus curiae*.

Respectfully submitted,

ROBERT D. RAVEN *
President,
American Bar Association
BRUCE A. GREEN
MARC M. ARKIN
GREGORY D. HUFFAKER, JR.
750 N. Lake Shore Dr.
Chicago, Illinois 60611
(312) 988-5000
Attorneys for
American Bar Association
As Amicus Curiae

* Counsel of Record

August 12, 1988

QUESTION PRESENTED

When a civil plaintiff includes a fictitious "John Doe" defendant in a complaint filed in state court, is a non-resident defendant automatically foreclosed from removing the case to federal court based on diversity of citizenship between the actual named parties?



TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
REASONS FOR GRANTING THE PETITION	3
CONCLUSION	6

TABLE OF AUTHORITIES

Cases	Page
<i>Bryant v. Ford Motor Company</i> , 844 F.2d 602 (9th Cir. 1987) (<i>en banc</i>), as amended on denial of rehearing and rehearing <i>en banc</i> , revising 832 F.2d 1080 (9th Cir. 1987)	2
<i>Chesapeake & Ohio Ry. Co. v. Cockrell</i> , 232 U.S. 146 (1914)	5
<i>Grigg v. Southern Pacific Co.</i> , 246 F.2d 613 (9th Cir. 1957)	4
<i>Hartwell Corp. v. Boeing Co.</i> , 678 F.2d 842 (9th Cir. 1982)	4
<i>Illinois Central R.R. Co. v. Sheegog</i> , 215 U.S. 308 (1909)	5
<i>Pullman Co. v. Jenkins</i> , 305 U.S. 534 (1939)	5
<i>Salem Trust Co. v. Manufacturers' Finance Co.</i> , 264 U.S. 182 (1924)	5
<i>Wecker v. National Enameling & Stamping Co.</i> , 204 U.S. 176 (1907)	5
Constitutional Provisions	
U.S. Const. art. III, § 2	2
Statutes	
Judiciary Act of 1789, 1 Stat. 73 (1789)	2
28 U.S.C. § 1446(b) (1982)	6
Miscellaneous	
Note, <i>Doe Defendants and Other State Relation Back Doctrines in Federal Diversity Cases</i> , 35 Stan. L. Rev. 297 (1983)	6
C. Wright, <i>The Law of Federal Courts</i> (4th ed. 1983)	5

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

No. 88-97

FORD MOTOR CO.,
Petitioner,
v.
GARY BRYANT,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF PETITION**

INTEREST OF AMICUS CURIAE ¹

The American Bar Association ("ABA") is an organization of more than 340,000 members of the bar, including many lawyers who represent parties in civil litigation. A primary goal of the organization is the promotion of improvements in the operation of the judicial system. In accord with the ABA's interest in the

¹ This brief is accompanied by a Motion For Leave To File, consent of respondent having been requested but refused.

effective functioning of the litigation process, since 1978 the organization has opposed legislation that would abolish or significantly curtail diversity jurisdiction in the federal courts.² The ABA believes that the present system of coordinate federal and state jurisdiction, which originated in Article III, section 2, of the Constitution and the Judiciary Act of 1789, 1 Stat. 73, has served the ends of justice well and should not be abandoned.

In the present case³ the Ninth Circuit adopted a bright-line rule that naming fictitious "John Doe" defendants in a civil complaint destroys diversity of citizenship in all cases. A nonresident defendant may not remove a diversity case to federal court until all of the "John Doe" defendants have been dismissed from the complaint. If left standing, this rule will have a significant and troublesome impact on civil litigation in this country.

On the one hand, the Ninth Circuit's bright-line rule will effectively block a defendant's right of access to the federal courts in diversity cases. Simply by including "John Doe" defendants in a civil complaint, a plaintiff can deny the defendant an opportunity to remove the action for a substantial period of time. In many cases, "John Doe" defendants will not be dismissed by the state court until the eve of trial. Only then, under the Ninth Circuit's ruling, will a nonresident defendant be able to remove a diversity case to

² In June 1978, the ABA adopted the following resolutions:

Be It Resolved, That the American Bar Association opposes the abolition of diversity jurisdiction as provided by S.2389.

Be It Further Resolved, That the American Bar Association opposes the curtailment of diversity jurisdiction by precluding a resident plaintiff from invoking federal jurisdiction as provided in S.2094.

³ *Bryant v. Ford Motor Company*, 844 F.2d 602 (9th Cir. 1987) (*en banc*), as amended on denial of rehearing and rehearing *en banc*, revising 832 F.2d 1080 (9th Cir. 1987).

federal court. Faced with the additional expense and delay in resolving a lawsuit, entailed by late removal, a defendant is apt not to exercise the right to a federal forum.

On the other hand, defendants may elect to remove the case, even though extensive proceedings have occurred in state court. This would create substantial (and substantially unproductive) delays in the resolution of civil disputes. It would also likely result in re-litigation in federal court of issues that were decided in state court.

This case thus raises important issues concerning both the efficient operation of this nation's litigation process and federal-state judicial relationships, issues which are of keen interest to the bar.⁴

REASONS FOR GRANTING THE PETITION

It is important that this Court review the Ninth Circuit decision in the present case, because it is likely to frustrate the proper invocation of diversity jurisdiction by defendants in cases brought not only in California but in a substantial number of other states. This deprivation of the right to remove a case to a federal court will affect not only citizens of those states but citizens of every other state who are sued in California or a state with similar procedures.

Decisions of this Court, prior Ninth Circuit decisions overruled in this case, and decisions in other circuits have all drawn a distinction between two types of unknown

⁴ The relatively low number of reported appellate decisions concerning the application of "John Doe" pleading statutes to removal jurisdiction does not adequately reflect the actual importance of this issue. These questions are rarely heard by appellate courts because the rulings are not appealable at the interlocutory stage; at a later stage the issue is generally moot.

party ("John Doe") situations. In one, a plaintiff does not know the name of an identifiable officer, employee, or agent of a known defendant or of another responsible person or entity, such as a nurse, mechanic, or independent contractor, but the plaintiff may reasonably assert that such a person exists and may be a non-diverse defendant. Although the Federal Rules of Civil Procedure do not provide for naming "John Doe" defendants, state practice often does, and the presence of such allegations may defeat diversity unless the party seeking to invoke diversity jurisdiction is able to show that any "John Doe" defendant would not destroy complete diversity.

The second category is the one illustrated in the present case in which a plaintiff is merely seeking to protect against subsequently discovering that unknown persons should have been named defendants, perhaps after the statute of limitations has run. Prior to the decision in this case, the addition of "John Doe" defendants under these circumstances even in the Ninth Circuit would *not* defeat diversity. Instead the "John Does" would be ignored for purposes of removal jurisdiction.⁵

The Ninth Circuit has here eliminated this distinction in order to provide a bright-line rule. In doing so, the majority opinion discussed only its own prior cases, which it overruled. That opinion, unlike the dissent, did not discuss Supreme Court cases, the principles for which they stand, or the controlling statutes—all of which support the traditional distinction, which permits a party to show that the "John Doe" defendant should be disregarded for purposes of removal because the "John Doe"

⁵ See, e.g., *Hartwell Corp. v. Boeing Co.*, 678 F.2d 842, 843 (9th Cir. 1982); *Grigg v. Southern Pacific Co.*, 246 F.2d 613, 619 (9th Cir. 1957).

has not been named in good faith or because it is a mere fiction.⁶

Insofar as California is concerned, this new rule seems to apply to all cases brought against non-resident defendants. In California practice, "John Doe" allegations are now made as a matter of course. In fact, they are recommended in respectable and, indeed, official form books, which California lawyers follow, perhaps initially simply to avoid possible statute of limitations problems and not to defeat diversity jurisdiction. That means that the "John Doe" allegations in California cannot be deemed fraudulent or sham or unethical in the usual sense. But that is what makes the practice very dangerous to diversity jurisdiction if applied as in this case, for it may affect virtually every case against a non-resident defendant.

Even if diversity jurisdiction would not be completely barred, it could be postponed for the three-year period in which service is permitted under California law or, as indicated by the opinion of the Court of Appeals, until plaintiff drops the Doe defendants or trial commences without their being served. As a practical matter, such a procedure would often delay the removal so long as to impair the prospect of a fair trial. Moreover, such a procedure would not comport with the federal policy,

⁶ See, e.g., *Pullman Co. v. Jenkins*, 305 U.S. 534, 541 (1939) ("[it] is always open to the nonresident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove."); *Salem Trust Co. v. Manufacturers' Finance Co.*, 264 U.S. 182, 189-90 (1924); *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146 (1914); *Illinois Central R.R. Co. v. Sheegog*, 215 U.S. 308, 316 (1909); *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176, 185-86 (1907); accord C. Wright, *The Law of Federal Courts* 174 (4th ed. 1983) ("It would make removal jurisdiction more of a game than ever if removal could be defeated by the simple device of naming as a defendant a fictional John Doe.").

embodied in 28 U.S.C. Section 1446(b), that removals be made promptly.

This rule will affect cases in California, which contains one-tenth of the population of the United States. In addition, the ABA is concerned about the prospect of this rule being followed by other circuits where states have similar "John Doe" procedures.⁷ The Ninth Circuit ruling is of national significance also because it deprives nonresidents of the opportunity to remove diversity cases to federal courts in the Ninth Circuit. This alone makes the case important enough for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT D. RAVEN *
 President,
 American Bar Association
 BRUCE A. GREEN
 MARC M. ARKIN
 GREGORY D. HUFFAKER, JR.
 750 N. Lake Shore Dr.
 Chicago, Illinois 60611
 (312) 988-5000
Attorneys for
American Bar Association
As Amicus Curiae

* Counsel of Record

⁷ See Note, *Doe Defendants and Other State Relation Back Doctrines in Federal Diversity Cases*, 35 Stan. L. Rev. 297, 300-303 (1983) (reviewing state "Doe" practice rules).

